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No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

CLABURN LOCKWOOD,

Petitioner,

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1:

Where a policy interpretation construes an ambiguous regulation, did the Ninth Circuit err in failing to afford controlling deference to that reasonable published interpretation under *Auer v. Robbins*, 519 U.S. 452, 461 (1997)?

Question 2:

Did the Ninth Circuit err in considering an outdated interpretation of an ambiguous regulation as deserving respect under *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944) after multiple other interpretations worked through the nuances of the regulatory scheme to contradict that ancient interpretation?

LIST OF PARTIES

The parties to the proceeding below are Claburn Lockwood, as the Petitioner, and Michael J. Astrue, Commissioner of Social Security, as the Respondent. There are no other parties.

RULE 29.6 STATEMENT

Claburn Lockwood is not a corporation. She is an individual seeking disability benefits under Title XVI of the Social Security Act § 1601 ff.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Claburn Lockwood petitions for a writ of certiorari to review the August 16, 2010 decision of the United States Court of Appeals for the Ninth Circuit in the above-entitled proceeding finding that the published policy of the Commissioner of Social Security would not receive controlling deference on the question of how an Administrative Law Judge (ALJ) must consider age under the Social Security Act and regulations promulgated there under and whether the ALJ must articulate the consideration of age in a borderline situation within a few days or few months of a bright line age category under the factors detailed. Because the Ninth Circuit's legal ruling is contrary to established law, Claburn Lockwood hereby petitions for a writ of certiorari.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court for the District of Oregon and the opinion of the United States District Court for the District of Oregon are reproduced in the Appendix.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit published its opinion on August 16, 2010. Claburn Lockwood timely filed a petition for rehearing and rehearing en banc. The ninth circuit denied the petition for rehearing and rehearing en banc on December 6, 2010. See Appendix (App.) 64.

This petition for a writ of certiorari comes before the Court within 90 days of the denial of the petition for rehearing and rehearing en banc and is timely under Supreme Court Rules 13.3, 29.2, and 30.1. Claburn Lockwood invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY, REGULATORY, AND SUB-REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1382d(a)(3)(B):

> For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with

> respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

20 C.F.R. § 416.963(b) (2010)

> How we apply the age categories. When we make a finding about your ability to do other work under § 416.920(f)(1), we will use the age categories in paragraphs (c) through (e) of this section. We will use each of the age categories that applies to you during the period for which we must determine if you are disabled. We will not apply the age categories mechanically in a borderline situation. If you are within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that you are disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of your case.

Additionally, the entirety of 20 C.F.R. § 416.963(b), pertinent provisions of the published interpretation of the statutory commandment to consider age, the ambiguous regulatory construction of that commandment by the Commissioner of Social Security, Programs Operations Manual System (POMS) DI 25015.005 (TN 3 (05-06)) in four iterations, POMS DI 25015.005 BASIC (07-00), and HALLEX II-5-3-2 are lengthy and reproduced in the Appendix.

STATEMENT OF THE CASE

Claburn Lockwood comes before the Court because the Commissioner violated his interpretation of the statutory and regulatory requirement to consider age as construed and interpreted by him in POMS DI 25015.005 (TN 3 (05-06)). Had the final decision of the Commissioner complied with POMS, Lockwood would have received benefits instead of a denial.

Claburn Lockwood filed an application for Supplemental Security Income benefits alleging that she could not engage in substantial gainful activity. After the Commissioner of Social Security denied the claim initially and upon reconsideration, Ms. Lockwood submitted the claim to an Administrative Law Judge (ALJ) for a de novo decision on the merits of her claim.

The ALJ uses the five-step sequential evaluation process required by the Commissioner. 20 C.F.R. § 416.920 (2010). The ALJ found that Ms. Lockwood did not engage in any substantial gainful activity at any time relevant to the decision. App. 50, ¶ 2. The ALJ found that Ms. Lockwood suffered from medically determinable severe impairments consisting of left knee injury and surgeries; degenerative disk disease of the lumbar spine with a history of fusion; a history of foot surgery; anxiety; a depressive disorder; and alcoholism. App. 50, ¶ 8, citing 20 C.F.R. § 416.920(c). The ALJ compared those findings to the Commissioner's listing of impairments and found that Ms. Lockwood did not meet or equal any "listing" either individually

or in combination. App. 51, ¶ 4, citing 20 C.F.R. part 404, subpart P, Appendix 1. The ALJ assessed Ms. Lockwood as retaining the residual functional capacity to perform the demands of light exertional level work, lifting 20 pounds occasionally and 10 pounds frequently; able to stand and walk 6 hours out of an 8-hour day; and sit 6 hours out of an 8-hour day. She would be able to do both simple and complex tasks not requiring close or frequent social contact with the public or others. App. 52, ¶ 5. The ALJ compared the findings of residual functional capacity to the demands of Ms. Lockwood's past relevant work and decided that Ms. Lockwood could not perform work as an operator of a bed and breakfast or as a bread seller. App. 60, ¶ 6. The ALJ classified Ms. Lockwood as an individual closely approaching advanced age with a high school education and with "minimally transferable" work skills. App. 60, ¶¶ 7-9. The ALJ adduced vocational expert testimony for the proposition that a person of Ms. Lockwood's age, education, and work experience with the residual functional capacity assessed could nonetheless make the adjustment to other work as production assembler and house cleaner. App. 62, ¶ 10, citing 20 C.F.R. part 404, subpart P, Appendix 2. The ALJ decided that Ms. Lockwood did not suffer from a disability under the Social Security Act. App. 63, ¶ 11.

Ms. Lockwood timely sought review of the ALJ decision by the Appeals Council, which denied the request for review on October 17, 2007. App. 35-39.

The action of the Appeals Council made the decision of the ALJ the final decision of the Commissioner on that date. Claburn Lockwood timely filed a complaint in the United States District Court for the District of Oregon to review the final decision of the Commissioner pursuant to 42 U.S.C. § 405(g). *Lockwood v. Commissioner*, Civil No. 07-1838-KI. The District Court affirmed the final decision of the Commissioner. App. 14-33 and 44.

Claburn Lockwood timely appealed from the decision of the District Court to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the decision of the District Court by published opinion pertinent to the questions presented on this petition for certiorari. *Lockwood v. Commissioner*, 616 F.3d 1068 (9th Cir. 2010); App. 1-13. Ms. Lockwood timely sought rehearing or rehearing *en banc* by the Court of Appeals. The Court of Appeals for the Ninth Circuit denied the petition for rehearing or rehearing *en banc* on December 6, 2010. App. 65.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

This case is about the power of the executive branch to explain the meaning and import of its regulations and have those explanations granted the controlling weight under this Court's jurisprudence canceling an agency's ability to evade that explanation to defend a prior administrative decision. The Commissioner of Social Security explains the

borderline age regulation and requires consideration of additional vocational adversities and the proximity in time to the next age category with an explanation of its application. 42 U.S.C. § 1382d(a)(3)(B); 20 C.F.R. § 416.963(b); POMS DI 25015.005 (TN 3 (05-06)). The Circuit Court excused the final decision of the Commissioner from this current requirement in effect when the ALJ decision became the final decision of the Commissioner and throughout litigation. *Lockwood v. Commissioner*, 616 F.3d 1068 (9th Cir. 2010). Public confidence in the largest adjudicative body in the world requires that the Commissioner follow his published interpretation of his regulations at the time of administrative and judicial review on substantive consideration of age and procedural requirement for an explanation.

A. THE POLICY INTERPRETATIONS OF THE COMMISSIONER PROPERLY CONSTRUE THE REGULATION AND ARE ENTITLED TO CONTROLLING WEIGHT

Congress enacted the Social Security Act directing the Commissioner of Social Security to grant disability benefits to individuals incapable of performing either their past work or any other work existing in the national economy. The statute directs the Commissioner to consider age, education, and work experience in making the determination of the ability to perform "other work." 42 U.S.C. § 1382d(a)(3)(B) provides in relevant part that:

> an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, *considering his age*, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . .

(Emphasis added). Congress did not define how to consider age in the disability calculus but left that determination to the Commissioner to determine.[1]

The statute requires the consideration of age as part of the disability determination once the claimant for benefits proves the inability to engage any past work. 42 U.S.C. § 1382d(a)(3)(B). The Commissioner promulgated regulations providing for a matrix determination of consideration of age along with education, work experience, and residual functional capacity. 20 C.F.R. part 404, subpart P, Appendix 2 (hereafter "Appendix 2" or "Medical Vocational Guidelines" and commonly referred to as the "grids"). The Medical-Vocational Guidelines matrix applies equally to disability claims under Title XVI of the Social Security Act. 20 C.F.R. § 416.969. The three primary tables consider the capacity for sedentary,

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[1] The Commissioner is now the statutory designate with the power to construe the statute by regulation. Many of the regulations were promulgated historically under the aegis of the Secretary of Health and Human Services or the Secretary of Health, Education, and Welfare. "The Commissioner" in this brief includes all manner of his predecessors.

light, and medium exertion work in concert with varying combinations of age categories, educational achievements, and work classifications. The Commissioner defines the broad age categories as "younger individual" from 18 to 49 years of age, "closely approaching advanced age" from 50 to 54 years of age, "advanced age" from 55 to 59 years of age, and "closely approaching retirement age" from 60 to 64 years of age. 20 C.F.R. § 416.963. An individual "closely approaching advanced age" limited to light exertion with a skilled or semi-skilled work history but lacking transferable skills and a high school or greater education is generally considered "not disabled" by the Commissioner's Medical-Vocational Guidelines. Appendix 2, Rule 202.14. That same education, work background, and residual functional capacity coupled with classification as "advanced" age is deemed disabled by the Medical-Vocational Guidelines. Appendix 2, Rule 202.06. Whether Ms. Lockwood at 33 days short of her 55th birthday is classified as closely approaching advanced age or as advanced age makes the difference between a denial and a grant of benefits.

To guide the determination of which age category to use in the disability calculus, the Commissioner promulgated the age regulation. 20 C.F.R. § 416.963. The Commissioner states that:

> How we apply the age categories. [. . .] We will not apply the age categories mechanically in a borderline situation. If you are within a few days to a few months of reaching an

> older age category, and using the older age category would result in a determination or decision that you are disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of your case.

20 C.F.R. § 416.963(b) (referred to alternatively as "the age regulation").

Under the statutory commandment to consider age in making disability determinations, the Commissioner has full power to promulgate the Medical-Vocational Guidelines contained in Appendix 2 and the age regulation. See generally *Heckler v. Campbell*, 461 U.S. 458, 467, 470 (1983). The regulatory requirement to "consider whether to use the older age category" begs the question of "how."

The Commissioner of Social Security explains the borderline age regulation and requires an explanation of its application. POMS DI 25015.005 (TN 3 (05-06)). POMS DI 25015.005 (TN 3 (05-06)) sets forth a two-part test for establishing the existence of a borderline age situation alluded to in the age regulation. First, is the individual within a few days or few months of the next higher age category? Second, would use of the next higher age category change the determination from "not disabled" to "disabled"? POMS DI 25015.005.A.3 (TN 3 (05-06)). If a borderline age situation does exist, then the Commissioner construes the age regulation to inquire whether the Medical-Vocational Guidelines fully describe the profile of the claimant; whether additional adversities

of residual functional capacity, education, or work experience are present; whether the adversities have adverse vocational implications; and the proximity of time to the next higher age category. POMS DI 25015.005.B.1 (TN 3 (05-06)).

POMS DI 25015.005.B.2 (TN 3 (05-06)) provides examples of additional vocational adversities. An additional impairment that infringes upon the vocational base without substantially narrowing it constitutes a vocational adversity that warrants using the higher age category. A limitation that does not significantly erode the ability to engage in unskilled work constitutes a vocational adversity that warrants using the higher age category. Marginal literacy and marginal capacity to communicate in English constitute a vocational adversity that warrant using the higher age category. A work history that focused on one isolated industry or work setting constitutes a vocational adversity that warrants using the higher age category. The Commissioner cautions in the closing of POMS DI 25015.005.B.2 (TN 3 (05-06)) that other adverse circumstances may justify using a higher age category in the exercise of sound adjudicative judgment.

POMS DI 25015.005.B.4 (TN 3 (05-06)) sets out the context of how the ALJ or other adjudicator must exercise sound adjudicative judgment. The Commissioner demands that the adjudicator "state whether it was determined to sue the next higher age category or to use the individual's chronological age and explain why." *Id.* The Commissioner highlights the need

for facial consideration that the "specific factors supporting either determination must be explained." *Id.*

POMS DI 25015.005 (TN 3 (05-06)) comprises the Commissioner's informed and experience-based interpretation of the statutory requirement to consider age and the regulatory framework imposed on the disability paradigm. Between the age categories in borderline situations, POMS DI 25015.005 (TN 3 (05-06)) defines the factors and methodology in determining whether the ALJ should have considered Ms. Lockwood a person closely approaching advanced age or of advanced age on the date of the ALJ decision and further requires an explanation to show adherence to the policy interpretation of the age regulation.

Claburn Lockwood was 33 days short of her 55th birthday on the date of the ALJ decision. This amount of time falls within the boundaries of a few days or few months before the change in age categories. If treated as an individual "closely approaching advanced age" then Ms. Lockwood's vocational profile calls for a decision of "not disabled." Appendix 2, Rule 202.14. If treated as an individual of "advanced age" then Ms. Lockwood is deemed disabled. Appendix 2, Rule 202.06. Ms. Lockwood presented with a borderline age situation. Her additional vocational adversities justify use of the higher age category. The ALJ did not hint at consideration much less explain her use of the lower age category, citing only the age regulation generically but not subsection (b) specifically. App. 60, ¶ 7.

The Circuit Court found the term "consider" of the borderline age question in the regulation to be unambiguous where a claimant is a few days to a few months from a higher and more favorable age category. *Lockwood v. Commissioner*, 616 F.3d 1068, 1070 (9th Cir. 2010); 20 C.F.R. § 416.963(b). Because the regulation is ambiguous, the Circuit Court looked first to the agency's interpretations of it. The Circuit Court applied the persuasive respect standard eventually deciding to give no deference to the Commissioner's interpretation of the age regulation on the faulty premise that the interpretation of the age regulation found in POMS DI 25015.005 (TN 3 (05-06)) had expired and was in conflict with an outdated Appeals Council interpretation. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944). The Circuit Court should have applied controlling deference unless plainly erroneous or inconsistent with the regulation to the explanation of the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Under *Auer,* the Commissioner's Program Operating Manual System (POMS) demands controlling deference as the official agency interpretation of regulations. 20 C.F.R. § 416.1002 (POMS provides mandatory instructions to assure uniform national application of program standards and service delivery to the public). The Social Security Administration, like any other federal agency, must have the ability to clarify its own regulations and the public must have the ability to rely upon the reasonable construction of those regulations unless plainly erroneous or

inconsistent with the regulation. *Auer*, 519 U.S. at 461; see also *Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 387-388 (2003) ("In short, the Commissioner's interpretation of her own regulations is eminently sensible and should have been given deference under" *Auer*).

All courts grant controlling deference to an agency's interpretation of an ambiguous statute where the agency's interpretation found in a regulation is not plainly erroneous or inconsistent with the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). *Chevron* deference requires formal notice and comment rulemaking, that is, due process, and this foundation gives the most weight to this form of deference to an agency interpretation. *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) citing *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981). Thus, 20 C.F.R. § 416.1002 merits *Chevron* deference and POMS constitutes a set of mandatory instructions for ALJs whenever POMS construes a regulation unless plainly erroneous or inconsistent with that regulation. *Auer*, 519 U.S. at 461.

In *Christensen v. Harris County*, 529 U.S. 576 (2000) this Court declined to extend *Auer* deference to an informal agency interpretation of the Fair Labor Standards Act and the regulations promulgated by the Secretary of Labor. This Court did so on the finding that the statute was not ambiguous. In this case, the Social Security Act directs the

Commissioner of Social Security to consider age in the disability determination and the regulations do so. But the regulation states that the bright line test set up by the Medical-Vocational Guidelines will not apply mechanically in borderline situations. 20 C.F.R. § 416.963(b). In the cases, the Commissioner promises to consider use of the higher age category when the person claiming disability is within a few days or few months of the next age category. Because the statute and regulation in combination are unclear how the Commissioner will consider the borderline age situation, the Commissioner properly construes the parameters of the regulation in POMS DI 25015.005 (TN 3 (05-06)). See also *Keys v. Barnhart*, 347 F.3d 990, 993-994 (7th Cir. 2003) (Posner, J.) (questioning whether *Auer* survived *Christensen*).

The Court answered the speculation of the lower Court in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). In addition to deferring to the more detailed of two contradictory regulations, the Court granted *Auer* deference to the Advisory Memorandum where the agency has clearly struggled with its own regulatory paradigm. In this case, the POMS provision construing the regulation was not shrouded behind the watchful public eye but published by the Commissioner as his authoritative construction of the age regulation. See Section B *infra*; see also *In re Farmers Insurance Exchange*, 481 F.3d 1119, 1129 (9th Cir. 2007) (granting *Auer* deference to an agency opinion letter); *In re Wal-Mart Stores, Inc.*, 395 F.3d 1177 (10th Cir. 2005) (granting *Auer* deference to

opinion letters construing an ambiguous regulation); *Senger v. City of Aberdeen*, 466 F.3d 670, 674 (8th Cir. 2006) (granting *Auer* deference to the Department of Labor's interpretation of its own regulations in an opinion letter and amicus brief). The Eleventh Circuit does not grant *Auer* deference to opinion letters. *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 628 fn. 8 (11th Cir. 2004). The Sixth Circuit has held that published interpretations are not entitled to deference. *Myers v. Copper Cellar Corp.*, 192 F.3d 546, 554 (6th Cir. 1999). The tension among the circuits on the question of *Auer* deference heightens the need for clarification of the boundaries of an agency's ability to construe its own regulations. Where a statutory scheme permits if not demands that the executive agency fill in the gaps, a published interpretation of such an ambiguous regulation should always have controlling weight if not plainly erroneous. To hold otherwise damages the public confidence in a system of administrative jurisprudence and the courts overview of that forum.

Under *Chevron* and *Auer*, controlling deference requires that the Court follow the interpretation because among competing interpretations, the agency is best suited to construe the statute that it administers and the regulations it promulgated. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) observes that:

> This broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical

> regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns."

Id. citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). The nuances in the question of disability in answering the facially simple question makes the Social Security regulations part of the complicated and technical regulatory program warranting broad deference.

The Supreme Court applied *Auer* deference in *Coeur Alaska Inc. v. Southeast Alaska Conservation Council*, 557 U.S. ___, 129 S.Ct. 2458, 2470 (2009). In *Coeur Alaska*, the Army Corps of Engineers and the Environmental Protection Agency (EPA) published competing regulations implementing the Clean Water Act. The Court gave controlling deference to an agency's interpretation of a regulation. Here, the Commissioner informs the agency, Ms. Lockwood, the public, and this Court that POMS DI 25015.005 (TN 3 (05-06)) requires an expressed consideration of the factors of a borderline age case operative before the decision at issue became final and through the date of the Court's judgment. Implied or inferred consideration is insufficient under POMS DI 25015.005 (TN 3 (05-06)). Interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice as informal rulemaking are exempt from these procedures under 5 U.S.C. § 553(b)(3)(A). Informal rulemaking stands as a basis for *Auer*

deference, not a reason to withhold controlling deference. *Chase Bank USA, N.A. v. McCoy*, ___ U.S. ___, 131 S.Ct. 871, 881 (2011) affirms the proposition that the Court defers to the agency's interpretation of its own regulation so long as that interpretation is not offered as a defense of past agency action. *Id.* citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988).

Under the watershed of *Chevron* and *Auer*, the question of deference turns on the authority of the agency to construe the statute and the authority of the agency to construe its own regulations. Once the Court finds that the policy interpretation is tied to an ambiguous regulation clearly permitted under the statutory scheme, the Court should always grant controlling weight to that interpretation unless it is plainly erroneous. *Skidmore* and other forms of lesser deference to agency policy should be reserved to promulgations unbound to a specific ambiguous regulation. The Commissioner should never seek refuge to disavow his own interpretation of an ambiguous regulation.[2]

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[2] The doctrine of nondelegation should never control where the agency seeks to disavow its regulations. See David J. Barron & Elena Kagan, "Chevron's Nondelegation Doctrine," 2001 Sup.Ct. Rev. 201, 204. This case is not a challenge to the Commissioner's authority to promulgate and construe regulations but is instead a matter of enforcing the regulation as the Commissioner construes it because every party should know what the law is before the litigation commences.

The Court should defer to the Commissioner in determining what the age regulation (20 C.F.R. § 416.963(b)) means. The Commissioner firmly tethered POMS DI 25015.005 (TN 3 (05-06)) to the age regulation and that interpretation is plainly consistent with the statutory command to consider age and the regulatory promulgations of the age question.

B. WHERE THE AGENCY'S INTERPRETATION OF ITS REGULATIONS HAS SHIFTED OVER TIME, THE COURT SHOULD PREFER ENFORCEMENT OF THE CURRENT, DETAILED, AND THOROUGH INTERPRETATION OF THE AMBIGUOUS REGULATION

The Commissioner has issued different policy interpretations of the age regulation. Effective November 2, 1993, the Office of Hearings and Appeals[3] published as part of the Hearings, Appeals and Litigation Law Manual (HALLEX) a provision construing the age regulation. HALLEX II-5-3-2 describes the subject of application of the Medical-Vocational Guidelines in borderline age situations casting the issue was whether to use a higher age category than a claimant's chronological age when applying the Medical-Vocational Guidelines. App. 79-83. HALLEX II-5-3-2 sets out the elements of the question as hinging

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[3] The Office of Hearings and Appeals is now known as the Office of Disability Adjudication and Review. See http://www.ssa.gov/appeals/about_odar.html.

on two questions of (1) whether the claimant is within a few days or few months of a higher age category and (2) whether using the higher age category would affect the outcome of the case. If the answer to both questions is affirmative, then the adjudicator must look to the presence of additional vocational adversities giving examples of education and work experience. The HALLEX provision adds that the "adjudicator need not explain his or her use of the claimant's chronological age." HALLEX II-5-3-2 gives the adjudicator the discretion to apply the higher age category in proximity to the alleged onset date, the date last insured, or the date of the ALJ decision. App. 79-83.

Other provisions of HALLEX describe the limited scope of HALLEX II-5-3-2. In HALLEX II-1-5-19, II-1-19-17, II-1-11-15, and II-1-12-8, the Office of Disability Adjudication and Review describes the interpretation of the age regulation as:

> HALLEX *Appeals Council Interpretation*: II-5-3-2, Age Requirements and the Application of the Medical-Vocational Guidelines to Borderline Situations

(Emphasis added).

Between June 20, 2002 and May 24, 2006, the Commissioner published POMS DI 25015.005 BASIC (07-00) describing policy of age as a vocational factor for use by all components of the Social Security Administration. App. 75-78. In paragraph A.3, the Commissioner confirmed the principle found in the age

regulation that the agency "will not apply the age categories mechanically in a borderline situation." POMS DI 25015.005.A.3 BASIC (07-00). The Commissioner continued in that provision to state that the Social Security Administration "will consider whether to use the older age category after evaluating the overall impact of all factors of the individual's case." POMS DI 25015.005.A.3 BASIC (07-00).

The Circuit Court decision declined to give weight to the interpretation of the borderline age situation in the age regulation as articulated by the Commissioner in POMS DI 25015.005 (TN 3 (05-06)), under the patent impression that it had expired. *Lockwood v. Commissioner*, 616 F.3d at 1073. It had not. The Commissioner attached a copy of POMS DI 25015.005 (TN 3 (05-06)) effective May 25, 2006 through July 20, 2006. To the extent that the Commissioner implied to the Court that no version of POMS DI 25015.005 survived July 20, 2006, the Circuit Court was misled. The Commissioner publishes POMS DI 25015.005 (TN 3 (05-06)) as the current interpretation of 20 C.F.R. § 416.963(b) on his secure website. https://secure.ssa.gov//poms.nsf/lnx/0425015005! (App. 65-74). POMS DI 25015.005 (TN 3 (05-06)) is the current valid interpretation of 20 C.F.R. § 416.963. See also App. 74 (listing intervening iterations of POMS DI 25015.005 (TN 3 (05-06)) with changes not relevant here).

POMS DI 25015.005 (TN 3 (05-06)) is the current expression of the Commissioner in interpreting 20 C.F.R. § 416.963(b). POMS DI 25015.005 (TN 3

(05-06)) stood as the last expressed interpretation of the regulation since before the ALJ decision became the final decision of the Commissioner and remains the last expressed interpretation of the regulation as of the date of the filing of this request for rehearing.

Assigning judicial importance to any legal standard as it stood at the date of the ALJ decision conflicts with well-settled law. The ALJ decision was not final until the Appeals Council denied the request for review. *Ball v. Massanari*, 254 F.3d 817, 820-821 (9th Cir. 2001). *Ball* holds that because the ALJ decision does not become the final decision of the Commissioner until after the Appeals Council denies review; it is the law as it stands on the date of administrative finality that matters. *Id. Ball* states:

> Ball's claim was not "finally adjudicated by the Commissioner" because final administrative action did not take place until the Appeals Council denied review on May 6, 1998, well after the March 29, 1996 enactment date of the relevant amendments.

Id.; see also *Keys v. Barnhart*, 347 F.3d 990, 992 (7th Cir. 2003). *Ball* further holds that this Court enforces the law in effect at the time of the Court's decision. *Id.* citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 245, 269 (1984). At the time of the Circuit Court's decision, POMS DI 25015.005 (TN 3 (05-06)) interpreted 20 C.F.R. § 416.963(b) as requiring the Commissioner to provide a written explanation for choosing between "closely approaching advanced age" and

"advanced age" category in the grids in light of the factors articulated.

The Seventh Circuit applied a change in the regulation to a pending case. *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993) holds that:

> A rule simply clarifying an unsettled or confusing area of the law, on the other hand, does not change the law, but restates what the law according to the agency is and has always been: "It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand." *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 135, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936); . . .

Levy v. Sterling Holding Co., LLC, 544 F.3d 493, 506 (3d Cir. 2008) holds that:

> where a new rule constitutes a clarification – rather than a substantive change – of the law as it existed beforehand, the application of that new rule to pre-promulgation conduct necessarily does not have an impermissible retroactive effect, regardless of whether Congress has delegated retroactive rulemaking power to the agency.

But see *Rubio v. Capital One Bank*, 613 F.3d 1195 (9th Cir. 2010) (declining to give force to a new regulation but allowing it to inform the Court as "relevant and helpful"). *Combs v. Commissioner of Social Security*, 459 F.3d 640 (6th Cir. 2006) (*en banc*) generally and correctly observes that if the statute

"retroactivity" is based on considerations of "fair notice, reasonable reliance, and settled expectations offer sound guidance." *Combs*, 459 F.3d at 646 citing *Landgraf*, 511 U.S. at 270.

Some party always loses in a change in the law or change in interpretation of the law.[4] See e.g. *Combs*, 459 F.3d at 656 (deletion of the obesity listing applied to all pending cases). No party "loses" in the clarification the interpretation of 20 C.F.R. § 416.963(b). The Commissioner holds as a matter of agency policy that the correct interpretation of 20 C.F.R. § 416.963(b) requires the decision to explain the factors used in making the borderline age determination. POMS DI 25015.005 (TN 3 (05-06)) at A.3 and B.4, App. 66-68, 73; see also App. 74. The Commissioner cannot maintain that he loses when he clarifies an interpretation of a stable but ambiguous regulation. When the agency in litigation disavows the policy determination of the Commissioner, the agency commits violence against the duties and obligations entrusted by statute to the Commissioner. If the Commissioner desires that an interpretation not apply to cases pending at a defined level of review, then the Commissioner must make that intention plain. The Commissioner

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[4] The notion that the ALJ deserves some protection poisons the system. The Court needs to assure that the decision complies with the legal standards found in the Act, regulations, rulings, and the reasonable interpretation of the Act and the regulations not published in the Federal Register. Fairness to the ALJ transmutes the ALJ into a party when the ALJ is only the inquisitor with no stake.

did not do so in publishing and maintaining POMS DI 25015.005 (TN 3 (05-06)) as the current agency interpretation of 20 C.F.R. § 416.963(b).

The Court should establish a bright line test. The Commissioner argues that the POMS provision in place on the date of the ALJ decision should control, if any. Ms. Lockwood urges the Court to look to the interpretation of the ambiguous regulation in effect at the time of the Court's decision. The interpretation contained in POMS DI 25015.005 BASIC (07-00) (rev. 6/20/02) did not include a requirement to consider more substantively and to explain the procedural resolution of the borderline age situation but did not rule one out either. POMS DI 25015.005 (TN 3 (05-06)) (rev. 5/25/06), (rev. 7/21/06), (rev. 11/20/08), and (rev. 9/15/09) all require at paragraph A.3 that "[s]uch judgments must be supported by the evidence in file and be carefully explained." App. 66-68; see also App. 74. All four iterations require at paragraph B.4 that "the adjudicator must state whether it was determined to use the next higher age category or to use the individual's chronological age and explain why. The specific factors supporting either determination must be explained." App. 73. All four iterations require at paragraph C.2 that "[f]or findings of not disabled, explain the lack of adjudicative impact of the varying age levels on an SSA-5002 or case summary sheet." App. 74. While POMS DI 25015.005 (TN 3 (05-06)) underwent three revisions between May 25, 2006 and the present, none affect the Commissioner's sound judgment that between the date the administrative decision became final and the date of this

Court's decision, the Commissioner consistently construes 20 C.F.R. § 416.963(b) to require an explanation in the instance of a borderline age case, i.e. a few days or few months before entering the next age category. The mere citation to the regulations defining age categories and a statement of the chronological ages does not satisfy the self-imposed burden. App. 60, ¶ 7. The presence of four iterations of POMS DI 25015.005 (TN 3 (05-06)) as a consistent statement construing the age regulation weighs in favor of *Auer* deference. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. at 212.

The Circuit Court's identified conflict between POMS DI 25015.005 (TN 3 (05-06)) and HALLEX II-5-3-2. The Appeals Council published the HALLEX guidance memorandum on November 2, 1993. As between the publication of HALLEX II-5-3-2 in 1993 and the publication of POMS DI 25015.005 (TN 3 (05-06)) in May 2006, the latter expresses the Commissioner's current interpretation of 20 C.F.R. § 416.963(b), because it comes later in time. Obsolescence by implication of a later pronouncement is a settled legal concept. *Lockhart v. U.S.*, 546 U.S. 142, 148-149, (2005) (Scalia, J., concurring) (a legislature is not bound by prior requirements for express rejection but may invalidate statutory provisions by implication). Nor should the Commissioner in administering a complex statutory scheme with even more complex regulations suffer binding by prior interpretations. When faced with competing policy interpretations of ambiguous regulations, the Court should

grant *Auer* deference only to the ultimate articulation. POMS need not directly overrule HALLEX but may do so by simple articulation of a different policy.

In addition to being the last statement of the Commissioner interpreting 20 C.F.R. § 416.963(b), the structure of POMS DI 25015.005 (TN 3 (05-06)) is prescriptive. The decision-maker must clearly explain the use of the factors involved in the borderline age calculation. As a prescriptive provision of POMS tethered to a discrete regulation, the Commissioner's view in POMS vis-à-vis the regulation takes on controlling deference. The Commissioner states as a matter of regulation that:

> Other written guidelines means written issuances such as Social Security Rulings and memoranda by the Commissioner of Social Security, the Deputy Commissioner for Programs and Policy, or the Associate Commissioner for Disability and the procedures, guides, and operating instructions in the Disability Insurance sections of the Program Operations Manual System that are instructive, interpretive, clarifying, and/or administrative and not designated as advisory or discretionary. The purpose of including the foregoing material in the definition is to assure uniform national application of program standards and service delivery to the public.

20 C.F.R. § 416.1002.

By regulation, the Commissioner defines POMS DI 25015.005 (TN 3 (05-06)) as mandatory (not advisory or discretionary), instructive, interpretive, and clarifying of 20 C.F.R. § 416.963(b). The regulations require that district and branch offices maintain an index of HALLEX and that the hearing offices maintain a copy of HALLEX. 20 C.F.R. §§ 402.55 and 402.60, respectively. The regulations do not define HALLEX as instructive, interpretive, and clarifying and do not describe it as assuring uniform national application of program standards. Where HALLEX expresses tension with it, POMS is entitled to *Auer* deference under the regulatory preference for POMS.

Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007) counsels in favor of POMS over the 17-year-old HALLEX provision that is facially inconsistent. *Coke* granted deference to the more detailed and thorough of competing regulations and the internal memorandum reflecting that the agency had struggled with its own policy interpretation of the ambiguous regulation. But see *Sehie v. City of Aurora*, 432 F.3d 749, 752-753 (7th Cir. 2005) (declining to grant deference to either of conflicting opinion letters). Because this Court decided *Coke* after *Sehie*, the Seventh Circuit decision should fail.

POMS DI 25015.005 A.3 and B.4 require a careful explanation of the elements of the borderline age situation in the final decision of the Commissioner. POMS speaks both substantively and procedurally to

the age regulation. The first set of elements for consideration are:

- The medical-vocational rules fully consider the relative adversities of a claimant's exertional capabilities, age, education and work experience (including skill level).

- Therefore, additional vocational adversities in residual functional capacity (RFC), education, or work experience (beyond those already considered in the rules) are needed to support a determination to use the next higher age.

- Additional vocational adversity is found when some adjudicative factor(s) is relatively more adverse when considered in terms of that factor's stated criteria, or when there is an additional element(s) which has adverse vocational implications.

- The longer the period of time between an individual's actual age and attainment of the next higher age category, the progressively greater the additional adversity that must be present to support the use of the next higher age.

- Conversely, the shorter the period between an individual's actual age and the next higher age category, the less adversity and justification that are needed.

> • If there are no additional vocational adversities justifying use of the higher age category, the adjudicator will use the claimant's chronological age.

POMS DI 25015.005 (TN 3 (05-06)) at B.1.

The ALJ found Lockwood to suffer from severe impairments including left knee injury and surgeries; degenerative disc disease of the lumbar spine with a history of fusion; a history of foot surgery; anxiety; a depressive disorder; and alcoholism. App. 50, ¶ 3. The ALJ found that Lockwood's residual functional capacity suffers decrease by the non-exertional limitations of restrictions to simple and complex tasks not requiring close or frequent social contact with the public or others. App. 52, ¶ 5.

The two factors from POMS DI 25015.005 B.1 present constitute significant limitations not included in the Table 2 grid rules and the extreme proximity to age 55. Under POMS DI 25015.005 B.1, the ALJ erred in failing to make explicit her consideration of the erosion of the light occupational base and the hair's breadth of 33 days to age 55. *Kane v. Heckler*, 776 F.2d 1130, 1133 (3d Cir. 1985) (*quoting* 43 Fed.Reg. 55349, 55359 (1978)); see also *Daniels v. Apfel*, 154 F.3d 1129, 1133 (10th Cir. 1998) and Social Security Ruling 82-46c (borderline situation exists when there would be a shift in results caused by the

passage of a few days or months). Lockwood is disabled at age 55 given the ALJ's findings. 20 C.F.R. part 404, subpart P, Appendix 2, Rule 202.06 (the ALJ identified only unskilled other work at step 5 of the sequential evaluation process). App. 61, ¶ 10.

The proposition that disability arose before the crossing of the bright line to age 55 has support in the further erosion of the ability to perform light unskilled work activity. POMS DI 25015.005 B.3 provides for substantial patent exercise of discretion to the Commissioner in setting the onset date in the year before Lockwood turned age 55. The Court should reverse the final decision of the Commissioner and remand to the ALJ to exercise the discretion demanded by the Commissioner's controlling interpretation of 20 C.F.R. § 416.963(b).

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter. In the alternative, the Court should vacate and remand to the Circuit Court for consideration of the legal issues presented in light of *Coeur*

Alaska Inc. v. Southeast Alaska Conservation Council.

DATE: March 7, 2011

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLABURN M. LOCKWOOD, *Plaintiff Appellant,* v. COMMISSIONER SOCIAL SECURITY ADMINISTRATION, *Defendant Appellee.*	No. 09-35546 D.C. No. 3:07-cv-01838-KI OPINION

Appeal from the United States District Court
for the District of Oregon
Garr M. King, Senior District Judge, Presiding

Argued and Submitted
May 3, 2010 – Portland, Oregon

Filed August 16, 2010

Before: Andrew J. Kleinfeld, Carlos T. Bea, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Bea

COUNSEL

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Kent S. Robinson, Acting United States Attorney, Adrian L. Brown, Assistant United States Attorney, David Morado, Regional Chief Counsel, and Stephanie

R. Martz (argued), Assistant Regional Counsel, Social Security Administration, Seattle, Washington, for the defendant appellee.

OPINION

BEA, Circuit Judge:

The issue in this case is whether an administrative law judge ("ALJ") erred when she failed to explain in her written decision why she treated a social security disability benefits claimant as being a person closely approaching advanced age instead of treating the claimant as being a person of advanced age. We hold the ALJ did not err because she was required by regulation only to consider whether to use the older age category. The ALJ satisfied this requirement.

Social security regulations divide claimants into three age categories: younger persons (those persons under age 50), persons closely approaching advanced age (those persons age 50-54), and persons of advanced age (those persons age 55 or older). 20 C.F.R. § 404.1563(c)-(e). Where a claimant is within a few days or a few months of reaching an older age category (a "borderline situation"), an ALJ has discretion, but is not required, to use the older age category. *Id.* § 404.1563(b).

Here, Claburn Lockwood ("Lockwood") was one month and three days from turning 55 years old (and, thus, from becoming a person of advanced age) when the ALJ denied Lockwood's claim for social security

disability benefits. The ALJ treated Lockwood as being a person closely approaching advanced age – instead of using the older age category – and concluded that Lockwood was not disabled. The ALJ did not explain in her decision why she did not treat Lockwood as being a person of advanced age. The district court affirmed the ALJ's decision.

Lockwood contends, and the Commissioner of Social Security does not dispute, that the ALJ would have been required to conclude that Lockwood was disabled if the ALJ had treated Lockwood as being a person of advanced age. Thus, Lockwood contends the ALJ committed reversible error by failing to explain in her decision why she used Lockwood's chronological age – 54 years old.

Although an ALJ is required by regulation to *consider* whether to use an older age category in a borderline situation, there is no requirement that the ALJ explain in her written decision why she did not use an older age category. *See* 20 C.F.R. § 404.1563(b). On the facts of this case, the ALJ did not err when she did not address in her written decision the fact that Lockwood was just over one month from being a person of advanced age. Therefore, we affirm.[1]

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[1] In a memorandum disposition filed concurrently with this opinion, we address other claims raised by Lockwood.

I. Background

In 2003, Lockwood applied for disability insurance benefits under Title II of the Social Security Act and supplemental security income under Title XVI of the Act. After Lockwood's applications were denied, she requested a hearing before the ALJ. The ALJ held two hearings: one on June 2, 2005, at which Lockwood appeared and testified, and another on October 13, 2005, at which Lockwood did not appear.

The ALJ filed a decision on April 27, 2006, in which she concluded that Lockwood was not disabled. The ALJ applied the standard five-step test to determine whether Lockwood was disabled. *See* 20 C.F.R. § 404.1520. The ALJ found at Step 1 that Lockwood "ha[d] not engaged in substantial gainful activity at any time relevant to this decision" because Lockwood received no income from her work as a freelance artist – the only work she did after January 1999. At Step 2, the ALJ found Lockwood "ha[d] the following severe impairments: left knee injury and surgeries; degenerative disc disease of the lumbar spine with a history of fusion; a history of foot surgery; anxiety; a depressive disorder; and alcoholism." At Step 3, the ALJ found Lockwood "d[id] not have an impairment or combination of impairments that meets or medically equals any of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1."

The ALJ found Lockwood "has the residual functional capacity to lift 20 pounds occasionally and 10 pounds frequently. She can stand and walk 6

hours out of an 8-hour day and sit 6 hours out of an 8-hour day. She can do simple and complex tasks not requiring close or frequent social contact with the public or others." Based on Lockwood's residual functional capacity, the ALJ found at Step 4 that Lockwood "is unable to perform any past relevant work." Lockwood's "past relevant work" included her work "as an operator of a bed and breakfast and a bread seller," work that requires frequent contact with the public. However, at Step 5, the ALJ found that, "[c]onsidering [Lockwood's] age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that [Lockwood] can perform." That finding was based on the testimony of a vocational expert who identified "production assembler" and "house cleaner" as examples of jobs Lockwood could perform. Therefore, the ALJ concluded Lockwood was not disabled. The district court affirmed.

II. Standard of Review

We review *de novo* a district court's order that affirms an ALJ's denial of benefits. *Burch v. Barnhart,* 400 F.3d 676, 679 (9th Cir. 2005). We must uphold an ALJ's decision so long as it is supported by substantial evidence and is not based on legal error. *Id.* Further, even if the ALJ erred, we will uphold the decision so long as the error was harmless. *Id.*

III. Discussion

A claimant makes a prima facie showing of disability where, as here, the claimant has established that she suffers from a severe impairment that prevents her from doing past work. *Tackett v. Apfel,* 180 F.3d 1094, 1100 (9th Cir. 1999). Once the claimant makes such a showing, the Commissioner of Social Security ("Commissioner") bears the burden of "show[ing] that the claimant can perform some other work that exists in 'significant numbers' in the national economy, taking into consideration the claimant's residual functional capacity, age, education, and work experience." *Id.* The Commissioner can meet this burden in one of two ways: "(a) by the testimony of a vocational expert, or (b) by reference to the Medical-Vocational Guidelines ['the grids'] at 20 C.F.R. pt. 404, subpt. P, app. 2." *Id.* at 1101 (emphasis omitted).

The grids are matrices of the "four factors identified by Congress – physical ability, age, education, and work experience – and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy." *Heckler v. Campbell,* 461 U.S. 458, 461-62 (1983) (footnotes omitted). For purposes of applying the grids, there are three age categories: younger person (under age 50), person closely approaching advanced age (age 50-54), and person of advanced age (age 55 or older). 20 C.F.R. § 404.1563(c)-(e). The regulation also provides:

> We will not apply the age categories mechanically in a borderline situation. If you are within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that you are disabled, we will *consider* whether to use the older age category after evaluating the overall impact of all the factors of your case.

Id. § 404.1563(b) (emphasis added). It is clear from the text of this regulation that an ALJ is not *required* to use an older age category, even if the claimant is within a few days or a few months of reaching an older age category. *Id.*; *see Bowie v. Comm'r,* 539 F.3d 395, 399-401 (6th Cir. 2008) (holding that section 404.1563(b) "does not impose on ALJs a *per se* procedural requirement to address borderline age categorization in every borderline case").

Here, the ALJ satisfied the requirement that she *consider* whether to use the older age category.[2] The ALJ mentioned in her decision Lockwood's date of birth and found that Lockwood was 54 years old and, thus, a person closely approaching advanced age on the date of the ALJ's decision. Clearly the ALJ was aware that Lockwood was just shy of her 55th birthday, at which point she would become a person of

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[2] We need not and do not decide whether there must be at least some evidence in the ALJ's written decision that the ALJ considered the borderline age situation because, here, such evidence does appear in the ALJ's written decision.

advanced age. The ALJ also cited to 20 C.F.R. § 404.1563, which prohibited her from applying the age categories mechanically in a borderline situation. Thus, the ALJ's decision shows that the ALJ knew she had discretion "to use the older age category after evaluating the overall impact of all the factors of [Lockwood's] case."[3] 20 C.F.R. § 404.1563(b). Finally, we are satisfied the ALJ did not "apply the age categories mechanically" because the ALJ "evaluat[ed] the overall impact of all the factors of [Lockwood's] case" when the ALJ relied on the testimony of a vocational expert before she found Lockwood was not disabled.[4] *Id.*

Lockwood argues that the ALJ committed reversible error because she failed to consider the

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[3] We presume that ALJs know the law and apply it in making their decisions. Cf. *Walton v. Arizona*, 497 U.S. 639, 653 (1990) ("Trial judges are presumed to know the law and to apply it in making their decisions."), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 609 (2002).

[4] The Tenth Circuit's decision in *Daniels v. Apfel*, 154 F.3d 1129 (10th Cir.1998), did not address the issue before us here, because in that case, the government argued only that the petitioner failed to carry his burden of proving he should be classified in the higher age bracket, and did not cite or raise any arguments regarding the correct interpretation of the predecessor to § 404.1563(b). *Id.* at 1133. Here, by contrast, the government argues, and we agree, that under the plain language of § 404.1563(b) the ALJ needed to show only that she considered whether to use the older age category. To the extent that *Daniels* interprets the regulation as requiring an ALJ to do anything more, *see* 154 F.3d at 1134 n. 5, we join the Sixth Circuit in respectfully disagreeing, *Bowie*, 539 F.3d at 403.

requirements laid out in the Commissioner of Social Security's Hearings, Appeals, and Litigation Manual ("HALLEX"), an internal Social Security Administration policy manual. However, HALLEX does not impose judicially enforceable duties on either the ALJ or this court. *See Clark v. Astrue,* 529 F.3d 1211, 1216 (9th Cir. 2008). Moreover, our holding that an ALJ does not commit reversible error as long as she considers whether to use the older age category is consistent with HALLEX. *See Bowie,* 539 F.3d at 399-400 (explaining that HALLEX does not require an ALJ to address borderline situations in every written decision). In relevant part, HALLEX instructs ALJs to consider "additional vocational adversities" that could justify the use of the higher age category, and states that "[a]bsent a showing of additional adversity(ies) justifying the use of the higher age category. . . . [t]he adjudicator need not explain his or her use of the claimant's chronological age." Here Lockwood does not identify any additional vocational adversities that would have given the ALJ reason to treat Lockwood as a person of advanced age.

In addition to citing HALLEX, Lockwood relies on another internal Social Security Administration guidance document, the Program Operations Manual System ("POMS"), to support her contention that the ALJ was required to explain in her written decision why she decided to use Lockwood's chronological age rather than the next higher age category. The version of POMS to which Lockwood cites provides:

> Anytime a borderline age situation exists, the adjudicator must state whether it was determined to use the next higher age category or to use the individual's chronological age and explain why. The specific factors supporting either determination must be explained.

POMS DI 25015.005(B)(4) (effective only between May 25, 2006 and July 20, 2006). Like HALLEX, POMS constitutes an agency interpretation that does not impose judicially enforceable duties on either this court or the ALJ. *See Lowry v. Barnhart,* 329 F.3d 1019, 1023 (9th Cir. 2003). Such agency interpretations "are 'entitled to respect,'" but "only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris Cnty.,* 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)); *see Clark,* 529 F.3d at 1216. We are not persuaded by the cited section of POMS that the statute and regulations require the ALJ to provide further explanation with specific factors, for several reasons. First, the version of POMS in effect on April 27, 2006 – the time of the ALJ's decision – did not require the ALJ to provide an express explanation of the borderline age issue.[5] Therefore, the version of

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[5] The version of POMS in effect on April 27, 2006, simply parroted 20 C.F.R. § 404.1563(b):

> We will not apply the age categories mechanically in a borderline situation. If an individual is within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that the individual is

(Continued on following page)

POMS cited by Lockwood was not even applicable when the ALJ made her decision on April 27, 2006. Moreover, the later version of POMS cited by Lockwood is inconsistent with the guidance in HALLEX, discussed above.[6] The Social Security Administration's lack of a consistent direction weighs against giving POMS any substantial weight. *See Skidmore,* 323 U.S. at 140. Finally, the POMS guidance is not a persuasive interpretation of the regulation. The regulation at issue here requires only that the ALJ consider whether to use the older age category; it does not impose any obligation to make express findings incorporated in the ALJ's opinion.

Our holding is also consistent with the Sixth Circuit's holding in *Bowie.* In *Bowie,* the claimant was less than two months from a higher age category. 539 F.3d at 397. The ALJ concluded in his written decision that the claimant was a younger individual and

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> disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of the individual's case.

POMS DI 25015.005(A)(3) (effective June 20, 2002 through May 24, 2006).

[6] HALLEX instructs the ALJ to consider "additional vocational adversities"; where such adversities are absent, the ALJ need not explain her decision to use the claimant's chronological age. In contrast, the version of POMS cited by Lockwood *would* require an explanation of "specific factors" supporting the ALJ's decision to use the claimant's chronological age. Based on this inconsistency, neither the relevant HALLEX guidance nor the relevant POMS guidance has the "power to persuade." *Skidmore,* 323 U.S. at 140, 65 S.Ct. 161.

cited 20 C.F.R. § 404.1563, which prohibited him from applying the age categories mechanically. *Id.* However, the ALJ "did not explicitly address the possibility that [the claimant], less than two months shy of her 50th birthday, presented a 'borderline' situation, and he did not discuss the possibility of moving [the claimant] to the 'closely approaching advanced age' category." *Id.* The district court affirmed the ALJ's denial of benefits. *Id.* at 398.

On appeal, the Sixth Circuit affirmed and explained that the ALJ was not required by regulation "to address a claimant's borderline age situation in his opinion or explain his thought process in arriving at a particular age-category determination. Rather, the regulation merely promises claimants that the [Social Security] Administration will 'consider' veering from the chronological-age default in borderline situations." *Id.* at 399. The Sixth Circuit explained that the ALJ's ultimate disability determination was supported by substantial evidence because there was "simply no evidence in the record that [the claimant] suffered from any 'additional vocational adversities' that might justify placing her in the higher age category." *Id.* at 401.

IV. Conclusion

The ALJ did not err when she did not explain in her decision why she used Lockwood's chronological

age – 54 years old – instead of treating Lockwood as a person of advanced age (i.e., a person age 55 or older).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CLABURN M. LOCKWOOD,	)	
Plaintiff	)	Civil No. 07-1838-KI
v.	)	OPINION AND ORDER
MICHAEL J. ASTRUE,	)	
Defendant.	)	

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KING, District Judge:

Plaintiff Claburn Lockwood ("Lockwood") seeks judicial review of the Social Security Commissioner's final decision denying her applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under Titles II and XVI of the Social Security Act. This court has jurisdiction under 42 U.S.C. §§ 405(g) and 1383(c). The Commissioner's final decision is affirmed.

BACKGROUND

Born in 1951 (Tr. 87), Lockwood completed three years of post-secondary education. Tr. 175.[1] Lockwood reports past work as an art director, assistant oven builder, bread stand manager, baker, and bed and breakfast manager. Tr. 170, 210. Lockwood first applied for DIB on November 9, 2001, alleging disability since January 1997. Tr. 737-41. The Commissioner denied this application. Tr. 742. The record before this court contains a subsequent denial for an SSI claims filed by the Commissioner on February 27, 2002. Tr. 35-38. Lockwood did not appeal the denied claims.

Lockwood concurrently filed DIB and SSI claims on May 2, 2003. Tr. 87-89, 744-46. The Commissioner

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[1] Citations "Tr." refer to indicated pages in the official transcript of the administrative record filed with the Commissioner's Answer on March 18, 2008 (Docket # 9).

denied the SSI applications initially and upon reconsideration. Tr. 30-43, 47-49. Here the Commissioner found that Lockwood's impairments were disabling, but did not meet the twelve-month durational requirement. Tr. 39. The Commissioner therefore found Lockwood not eligible for SSI. *Id.* Regarding Lockwood's 2003 DIB claim, the Commissioner found that she was performing substantial gainful activity through her date last insured. Tr. 748. This finding precluded the Commissioner from performing further disability analysis in conjunction with Lockwood's DIB application. Tr. 748. In sum, the Commissioner denied both applications.

An Administrative Law Judge ("ALJ") held a hearing in conjunction with Lockwood's 2003 SSI claim on June, 2, 2005. Tr. 757-821. On April 27, 2006, the ALJ issued an unfavorable decision. Tr. 23-31. The Appeals Council accepted additional evidence into the record but denied review, making the ALJ's decision the final decision of the Commissioner. Tr. 7-10. Lockwood presently appeals this denial of her May 2003 application for benefits.

DISABILITY ANALYSIS

The Commissioner engages in a sequential process encompassing between one and five steps in determining disability under the meaning of the Act. 20 C.F.R. §§ 404.1520, 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987).

At step one, the ALJ determines if the claimant is performing substantial gainful activity. If she is, the claimant is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). At step two, the ALJ determines if the claimant has "a severe medically determinable physical or mental impairment" that meets the twelve-month durational requirement. 20 C.F.R. §§ 404.1509, 404.1520(a)(4)(ii), 416.909, 416.920(a)(4)(ii). If the claimant does not have such a severe impairment, she is not disabled. *Id.*

At step three, the ALJ determines whether the severe impairment meets or equals a "listed" impairment in the regulations. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is determined to equal a listed impairment, the claimant is disabled.

If adjudication proceeds beyond step three the ALJ must first evaluate medical and other relevant evidence in assessing the claimant's residual functional capacity ("RFC"). The claimant's RFC is an assessment of work-related activities the claimant may still perform on a regular and continuing basis, despite limitations imposed by her impairments. 20 C.F.R. §§ 404.1520(e), 416.920(e), Social Security Ruling ("SSR") 96-8p.

The ALJ uses this information to determine if the claimant can perform her past relevant work at step four. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the claimant can perform her past relevant work, she is not disabled. If the ALJ finds that the claimant's

RFC precludes performance of her past relevant work the ALJ proceeds to step five.

At step five the Commissioner must determine if the claimant is capable of performing work existing in the national economy. 20 C.F.R. §§ 416.920(a)(4)(v), 416.920(f); *Yuckert*, 482 U.S. at 142; *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999). If the claimant cannot perform such work, she is disabled. *Id.*

The initial burden of establishing disability rests upon the claimant. *Tackett*, 180 F.3d at 1098. If the process reaches the fifth step, the burden shifts to the Commissioner to show that "the claimant can perform some other work that exists in the national economy, taking into consideration the claimant's residual functional capacity, age, education, and work experience." *Id.* at 1100. If the Commissioner meets this burden the claimant is not disabled. 20 C.F.R. §§ 416.920(g), 416.966.

THE ALJ'S FINDINGS

The ALJ found that, based upon Lockwood's testimony, she performed no substantial gainful activity relevant to her claim for benefits. Tr. 25.[2] The ALJ found Lockwood's left knee injury and surgeries, degnererative disc disease of the lumbar spine, history

[2] This finding reverses the Commissioner's May 7, 2003, finding that Lockwood's DIB application was precluded by performance of substantial gainful activity.

of foot surgery, anxiety, depressive disorder, and alcoholism "severe" at step two in the sequential proceedings. Tr. 25. The ALJ found that these impairments did not meet or equal a listing at step three. Tr. 26. The ALJ found Lockwood's statements concerning the "intensity, duration, and limiting effects of [her] symptoms not "not entirely credible." Tr. 27. The ALJ subsequently assessed Lockwood's RFC:

> [T]he claimant has the residual functional capacity to lift 20 pounds occasionally and 10 pounds frequently. She can stand and walk 6 hours out of an 8-hour day and sit 6 hours out of an 8-hour day. She can do simple and complex tasks not requiring close or frequent social contact with the public or others.

Tr. 26. The ALJ concluded that this RFC allowed Lockwood to perform work in the national economy, and therefore found Lockwood not disabled. Tr. 30-31.

STANDARD OF REVIEW

The reviewing court must affirm the Commissioner's decision if the Commissioner applied proper legal standards and the findings are supported by substantial evidence in the record. 42 U.S.C. § 405(g); *Batson v. Commissioner for Social Security Administration*, 359 F.3d 1190, 1193 (9th Cir. 2004). This court must weigh the evidence that supports and detracts from the ALJ's conclusion. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citing

Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998)). The reviewing court may not substitute its judgment for that of the Commissioner. *Id.* (citing *Robbins v. Social Security Administration*, 466 F.3d 880, 882 (9th Cir. 2006)), *see also Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). Variable interpretations of the evidence are insignificant if the Commissioner's interpretation is a rational reading. *Id.*, *see also Batson*, 359 F.3d at 1193.

ANALYSIS

Lockwood challenges the ALJ's review of her medical record and the lay testimony. Lockwood also asserts that the ALJ erroneously failed to develop the record, failed to correctly apply SSR 82-59, and made inappropriate findings at steps two, three, and five of the sequential proceedings.

I. The ALJ's Decision Caption

Lockwood asserts that the ALJ erroneously captioned her decision. Pl.'s Opening Br. 12. The ALJ's headed her decision "Supplemental Security Income," but the ALJ's decision cites the legal standards for both SSI and DIB applications under Titles II and XIV. Tr. 23-31. The ALJ's conclusion specifically found that, "the claimant has not been under a "disability" as defined in the Social Security Act . . . ," and cited the Regulations pertaining to both Title II and Title XVI. Tr. 31 (citing 20 C.F.R. §§ 401.1520(g) and 416.920(g)). The ALJ's final conclusion at the end of

her decision states that Lockwood is not disabled based upon her April 23, 2003 application for DIB and her SSI application on the same date. Tr. 31.

The ALJ decision reviewed Lockwood's DIB and SSI applications filed April 23, 2003. Though the ALJ failed to include "Disability Insurance Benefits" in her initial caption (Tr. 23), this omission does not amount to reversible error.

II. The ALJ's Duty to Develop the Record

Lockwood asserts that the ALJ failed to develop the record, specifically asserting that "part of the file seems to be missing." Pl.'s Opening Br. 11.

A. Lockwood's Previous Application

Lockwood first asserts that the ALJ failed to develop the record regarding the Commissioner's finding that she is disabled. Pl.'s Opening Br. 11.

The record before this court shows that the Commissioner found Lockwood's impairments disabling on February 27, 2002, but also found that these impairments were not expected to last twelve months, and therefore Lockwood was not disabled under the Commissioner's rules. Tr. 39.

Lockwood asserts that the ALJ had access to further information which is not in the present record. Pl.'s Opening Br. 11. The Commissioner's February 27, 2002, findings are in the record before this court,

as noted. Tr. 39. This assertion is therefore without merit.

B. Medical Records

Lockwood also claims that the ALJ failed to obtain physician records, which she identifies as "the current doctor's records." Pl.'s Opening Br. 12. Lockwood also asserts that the Commissioner "must obtain" records from Dr. Loeb, Lockwood's present treating physician, *id.*, and that the ALJ should have recontacted treating physician Dr. Moller. *Id.* at 17.

The claimant bears the burden of producing evidence of disability. 20 C.F.R. §§ 404.1512(c), 416.912(c); *Tackett*, 180 F.3d at 1098. The ALJ's duty to develop the record is triggered when evidence is insufficient or when ambiguities arise. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005), *Armstrong v. Commissioner*, 160 F.3d 587, 590 (9th Cir. 1998).

Lockwood presently points to no ambiguity in the record before this court. Instead, she asserts that unidentified portions of the record are missing. The Commissioner now asserts that Lockwood did not disclose treatment by Dr. Loeb in her initial submissions, and notes that Lockwood's attorney promised to obtain Dr. Loeb's records at Lockwood's hearing. Def.'s Br. 8. The record supports the Commissioner's assertion regarding Lockwood's initial application. Tr. 171-73, 21-14. At Lockwood's hearing, the ALJ asked Lockwood's counsel "do you want to get

[Dr. Loeb's] records or do you want me to?" Tr. 764. Lockwood's counsel responded, "Either way," and then stated, "I'll go after them, because it'll perhaps speed it up." *Id.* The ALJ reasonably relied upon Lockwood's submission, and Lockwood cannot now assert that the ALJ failed to develop the record.

This court additionally finds no ambiguity warranting development in Dr. Moeller's opinion, discussed more fully below. For all of these reasons, Lockwood fails to establish that the evidence before this court is insufficient. Lockwood's submission that the ALJ failed to develop the record therefore fails.

III. Medical Source Statements

A. Standards

Generally, the ALJ must accord greater weight to the opinion of a treating physician than that of an examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If two opinions conflict, an ALJ must give "specific and legitimate reasons" for discrediting a treating physician in favor of an examining physician. *Id.*, at 830. The ALJ may reject physician opinions that are "brief, conclusory, and inadequately supported by clinical findings." *Bayliss*, 427 F.3d at 1216.

B. Dr. Kaur-Jayaram

Lockwood specifically asserts that the ALJ "failed to mention Dr. Kaur-Jayaram," and therefore "effectively

improperly rejected his opinion" regarding her pain-related limitations. Pl.'s Opening Br. 16.

Dr. Kaur-Jayaram performed two epidural injections for Lockwood's back pain, respectively in February and March 1997. Tr. 500-502. On April 22, 1997, Dr. Kaur-Jayaram stated that Lockwood was receiving pain management treatment for her lower back pain. Tr. 510. Dr. Kaur-Jayaram wrote:

> In my considerable experience with patients with this type of pain, I am bound to say that the pain from this condition can be fairly severe and incapacitating. In addition, Ms. Lockwood is very sensitive to any kind of pain medications which have been a restricting factor in trying to control her pain by these means. I would strongly suggest that she be given time off as well as perhaps allow her to work part-time until this condition is sorted out.

Tr. 510.

The ALJ need not discuss evidence that is insignificant or non-probative. *Howard v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003). Dr. Kaur-Jayaram provided no further explanation for his opinion and the record shows no further treatment notes from Dr. Kaur-Jayaram. Additionally, Dr. Kaur-Jayaram's opinions were predicated upon Lockwood's subjective reports, which the ALJ found not credible. For these reasons, the ALJ did not error in failing to discuss Dr. Kaur-Jayaram's April 22, 1997 opinion.

C. Dr. Moller

Lockwood asserts that the ALJ erroneously gave treating orthopedist Dr. Moller's opinion "little weight, because she found it vague, not understanding what 'previous work' [Dr. Moller] was referring to." Pl.'s Opening Br. 17. Lockwood does not identify what portion of Dr. Moller's opinion she references.

The ALJ discussed Dr. Moller's November 20, 2001, opinion that Lockwood could not perform work activity between March 2001 and April 2002. Tr. 29 (citing exhibit 21 F-35 [Tr. 572]). The ALJ's citation indicates a work release completed by Dr. Moller on November 20, 2001, which stated that Lockwood is "unable to do [regular] work 3/2001-04/2002." Tr. 572. The ALJ found that Dr. Moller provided no explanation for his statement, that Dr. Moller did not identify "regular work," and that Dr. Moller's opinion "involves vocational issues . . . not his area of expertise." Tr. 29.

The ALJ may reject physician opinions unsupported by clinical notes or findings. *Bayliss*, 427 at 1216. Disability opinions are furthermore reserved for the Commissioner. 20 C.F.R. §§ 404.1527(e)(1), 416.927(e)(1). For these reasons, the ALJ appropriately rejected Dr. Moller's November 20, 2001, statement.

D. Bipolar Disorder

Lockwood asserts that the ALJ "made no finding" regarding her alleged bipolar disorder. Pl.'s Opening

Br. 22. Lockwood does not point to the record, and does not identify any work-related limitations regarding her alleged bipolar disorder. *Id.*

The ALJ noted Lockwood's bipolar diagnosis. Tr. 28. The ALJ discussed examining psychologist Dr. Givi's finding that Lockwood's symptoms did not support a bipolar diagnosis. *Id.* Finally, the ALJ noted an October 2004 evaluation stating that Lockwood carries a bipolar diagnosis, but last experienced a manic episode twenty years ago. *Id.*

The record supports these findings. The ALJ's first citation refers to Dr. Helfing's March 20, 2003, psychiatric evaluation. Tr. 359-60. Dr. Helfing noted a "history of manic symptoms in the past" and assessed "bipolar disorder, depressed." *Id.* Dr. Givi stated that Lockwood does not meet bipolar disorder diagnostic criteria because she did not describe symptoms consistent with mania. Tr. 372. Finally, Dr. Krishnan noted Lockwood's "history of bipolar disorder, by screening," and that Lockwood's last manic episode occurred nearly twenty years ago. Tr. 490. Contrary to Lockwood's assertion, the ALJ made findings regarding her bipolar disorder. Tr. 28. The ALJ's findings are based upon the record and therefore affirmed.

IV. Lay Witness Testimony

Lockwood asserts that the ALJ rejected lay witness James McCormack's ("McCormack") testimony

regarding Lockwood's concentration and ability to handle stress Pl.'s Opening Br. 20. Lockwood also asserts that the ALJ erroneously omitted discussion of lay witness Barbara Hermens ("Hermens"). *Id.* at 21.

A. Standards: Lay Witness Testimony

The ALJ has a duty to consider lay witness testimony. 20 C.F.R. §§ 404.1513(d), 404.1545(a)(3), 416.913(d), 416.945(a)(3); *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001). Friends and family members in a position to observe the claimant's symptoms and daily activities are competent to testify regarding the claimant's condition. *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993). The ALJ may not reject such testimony without comment, and he must give germane reasons for rejecting lay testimony. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). Silent omission of lay testimony is never harmless, unless the reviewing court can confidently conclude that "no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination." *Stout v. Comm'r*, 454 F.3d 1050, 1056 (9th Cir. 2006).

B. Analysis

a. James McCordack

The ALJ noted McCormack's testimony that Lockwood's "concentration is impaired when she has a panic attack," and that Lockwood "does not handle stress well." Tr. 28. The ALJ found McCormack's

testimony "generally credible," but rejected McCormack's testimony regarding Lockwood's activities of daily living. *Id.*

The ALJ's RFC assessment limited Lockwood to "simple and complex tasks not requiring close or frequent social contact with the public or others." Tr. 26. The "simple" work restriction accommodates concentration lapses due to panic attacks. The ALJ's RFC therefore accommodated limitations stemming from Lockwood's panic attacks and stress symptoms. The ALJ made no reversible error regarding these portions of McCormack's testimony.

b. Barbara Hermens

Hermens completed a report on December 3, 2001, regarding Lockwood's activities of daily living in conjunction with Lockwood's earlier application for benefits. Tr. 196-207. Lockwood points to Hermens's testimony regarding Lockwood's limited activities following knee surgery, and Hermens's testimony that Lockwood has trouble sleeping and naps for two hours. Pl.'s Opening Br. 21. Lockwood also points to Hermens's testimony that Lockwood has not had a "typical day" since 1998, and that Lockwood primarily cares for her daughter. *Id.* This court will not address additional testimony unidentified by Lockwood.

The record shows that Hermens in fact stated that Lockwood can "walk, bus, bike," but subsequently

indicated that Lockwood does not take walks following her knee surgery. Tr. 199-200. Hermens declined to answer further questions regarding Lockwood's walking limitations. Tr. 200. Hermens stated that Lockwood sleeps five hours per night, and that "most days [Lockwood] gets her daughter ready for school and gets chores done, then rests her leg and get[s] ready for [her] daughter to get home." Tr. 206.

The ALL limited Lockwood from lifting more than ten pounds frequently and twenty pounds occasionally, and from standing, walking, or sitting, more than six hours each in an eight hour day. Tr. 26. Lockwood does not establish that crediting indicated portions of Hermens's testimony would compel the ALL to reach a different RFC assessment.

V. Social Security Ruling 82-59

Lockwood asserts that the ALL failed to consider her noncompliance with treatment under SSR 82-59. Pl.'s Opening Br. 18. Lockwood does not point to a specific instance in the ALJ's decision showing that the ALJ found that Lockwood failed to follow treatment.

SSR 82-59 addresses "failure to follow prescribed treatment," and directs that an ALJ must consider failure to follow treatment "only" where each of four specified conditions arise. SSR 82-59 at *1 (available at 1982 WL 31384). These conditions are: (1) the evidence establishes that an individual's impairments

preclude performance of substantial gainful activity, (2) the impairment has lasted or is expected to last twelve continuous months, (3) a treating source has prescribed treatment which is "clearly expected to restore capacity to engage in [substantial gainful activity]," and (4) the record shows that the claimant has refused to follow such treatment. *Id.*

Lockwood has met none of these conditions. Therefore, the ALJ was not obliged to apply SSR 82-59. This argument fails. The ALJ may consider a claimant's failure to follow prescribed treatment in his credibility analysis. *Smolen v. Chater*, 80 F.3d 1279, 1284 (9th Cir. 1996). The ALJ presently cited Lockwood's noncompliance with physical therapy treatment in her credibility finding. Tr. 27. Lockwood does not challenge the ALJ' s credibility finding. The ALJ' s findings are therefore affirmed.

VI. The ALJ's Steps Two and Three Findings

Finally, Lockwood asserts, without citation to the record or citation to legal authority, that the ALJ made erroneous findings at steps two and three regarding her alleged bipolar disorder. Pl.'s Opening Br. 22.

A. Step Two

At step two in the sequential proceedings, the ALJ determines if the claimant has a "severe" impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii).

An impairment is "severe" if it "significantly limits your ability to do basic work activities." 20 C.F.R. §§ 404.1520(c); 416.920(c); *see* also 20 C.F.R. §§ 404.1521; 416.921. Such an impairment must last, or be expected to last, twelve months. 20 C.F.R. §§ 404.1509; 416.909.

The ALJ's analysis at steps four and five must consider all of a claimant's impairments, both severe and non-severe. 20 C.F.R. §§ 404.1545(a)(2); 416.945(a)(2). Because the ALJ proceeded beyond step two in the sequential analysis, the court considers the effect of the ALJ's alleged error in reviewing the ALJ's subsequent findings. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (holding an ALJ's step two omission harmless when the ALJ proceeded beyond step two in the sequential analysis). For this reason, the court declines to discuss the severity of Lockwood's alleged bipolar disorder at step two. Lockwood establishes no reversible error at step two in the sequential analysis.

B. Step Three

The ALJ's step three findings are based upon medical evidence. 20 C.F.R. §§ 404.1520(a)(iii); 416.920(a)(iii). As discussed above, the ALJ's assessment of the medical record is based upon the record and correct legal standards. Lockwood's unsupported assertion that the ALJ failed to find that she met or equaled a listing at step three should therefore be rejected. Additionally, an ALJ's omission at a threshold step is harmless where the ALJ proceeded beyond

the indicated step in the sequential analysis. *See Lewis*, 498 F.3d at 911. For these reasons Lockwood establishes no reversible error in the ALJ's step three findings.

VI. The ALJ's Step Five Findings

Lockwood asserts that the ALJ erroneously found her not disabled under the Medical Vocational Guidelines "grids" due to the approach of her fifty-fifth birthday at the date of her hearing. Pl.'s Opening Br. 12. The ALJ presently based her step five findings upon the testimony of a vocational expert. Tr. 30-31.

The ALJ may rely upon the grids when they completely describe a claimant's exertional impairments. *Tackett*, 180 F.3d at 1101-02. If the claimant has additional non-exertional impairments not contemplated by the grids, such as an emotional disorder, the ALJ must call a vocational expert. *Id.* Lockwood's RFC assessment includes non-exertional limitations stemming from her depression and panic disorders. Tr. 26. Therefore, the ALJ was required to call a vocational expert.

The ALJ's questions to the vocational expert must include limitations that are properly supported by the record. *Osenbrock v. Apfel*, 240 F.3d 1157, 1163-65 (9th Cir. 2001). Here, the vocational expert stated that an individual with Lockwood's RFC

assessment could perform work in the national economy. Supp. Tr. 835-36.[3] Lockwood does not challenge this testimony or the ALJ's subsequent findings based upon that testimony. The ALJ's findings are therefore affirmed.

CONCLUSION

The Commissioner's decision that Lockwood did not suffer from disability and is not entitled to benefits under Titles II and XVI of the Social Security Act is based upon correct legal standards and supported by substantial evidence. The Commissioner's decision is AFFIRMED and the case is dismissed.

IT IS SO ORDERED.

Dated this 24th day of March, 2009.

/s/ Garr M. King
Garr M. King
United States District Judge

[3] Citations "Supp. Tr." refer to the indicated portions of the Supplemental Transcript, filed by the Commissioner on March 19, 2008 (docket # 10).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CLABURN M. LOCKWOOD, Plaintiff	)	
v.	)	CV-07-1838-KI
MICHAEL J. ASTRUE, Defendant.	)	JUDGMENT

Based on the record, IT IS ORDERED AND ADJUDGED that the decision of the Commissioner is affirmed and this case is dismissed.

Dated this 24th day of March, 2009.

/s/ Garr M. King
Garr M. King
United States District Judge

[SEAL] SOCIAL SECURITY ADMINISTRATION

Refer to: TLC
[Social Security Number Omitted]

Office of Disability Adjudication and Review
5107 Leesburg Pike
Falls Church, VA 22041-3255
Telephone: (703) 605-8000

Date: OCT 17 2007

NOTICE OF APPEALS COUNCIL ACTION

Clayburn M. Lockwood
[Address Omitted]
Portland, OR 97210

This is about your request for review of the Administrative Law Judge's decision dated April 27, 2006.

We Have Denied Your Request for Review

We found no reason under our rules to review the Administrative Law Judge's decision. Therefore, we have denied your request for review.

This means that the Administrative Law Judge's decision is the final decision of the Commissioner of Social Security in your case.

Rules We Applied

We applied the laws, regulations and rulings in effect as of the date we took this action. Under our rules, we will review your case for any of the following reasons:

- The Administrative Law Judge appears to have abused his or her discretion.
- There is an error of law.
- The decision is not supported by substantial evidence.
- There is a broad policy or procedural issue that may affect the public interest.
- We receive new and material evidence and the decision is contrary to the weight of all the evidence now in the record.

What We Considered

In looking at your case, we considered the reasons you disagree with the decision in the material listed on the enclosed Order of Appeals Council.

We found that this information does not provide a basis for changing the Administrative Law Judge's decision.

If You Disagree With Our Action

If you disagree with our action, you may ask for court review of the Administrative Law Judge's decision by filing a civil action.

If you do not ask for court review, the Administrative Law Judge's decision will be a final decision that can be changed only under special rules.

How to File a Civil Action

You may file a civil action (ask for court review) by filing a complaint in the United States District Court for the judicial district in which you live. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this letter.

You or your representative must deliver copies of your complaint and of the summons issued by the court to the U.S. Attorney for the judicial district where you file your complaint, as provided in rule 4(i) of the Federal Rules of Civil Procedure.

You or your representative must also send copies of the complaint and summons, by certified or registered mail, to the Social Security Administration's Office of the General Counsel that is responsible for the processing and handling of litigation in the particular judicial district in which the complaint is filed. The names, addresses, and jurisdictional responsibilities of these offices are published in the *Federal Register* (70 FR 73320, December 9, 2005), and are available on-line at the Social Security Administration's Internet site, https://s044a90.ssa.gov/apps10/poms.nsf/lnx/0203106020!opendocument.

You or your representative must also send copies of the complaint and summons, by certified or registered mail, to the Attorney General of the United States, Washington, DC 20530.

Time To File a Civil Action

- You have 60 days to file a civil action (ask for court review).

- The 60 days start the day after you receive this letter. We assume you received this letter 5 days after the date on it unless you show us that you did not receive it within the 5-day period.

- If you cannot file for court review within 60 days, you may ask the Appeals Council to extend your time to file. You must have a good reason for waiting more than 60 days to ask for court review. You must make the request in writing and give your reason(s) in the request.

You must mail your request for more time to the Appeals Council at the address shown at the top of this notice. Please put the Social Security number(s) also shown at the top of this notice on your request. We will send you a letter telling you whether your request for more time has been granted.

About The Law

The right to court review for claims under Title II (Social Security) is provided for in Section 205(g) of the Social Security Act. This section is also Section 405(g) of Title 42 of the United States Code.

The right to court review for claims under Title XVI (Supplemental Security Income) is provided for in Section 1631(c)(3) of the Social Security

Act. This section is also Section 1383(c) of Title 42 of the United States Code.

The rules on filing civil actions are Rules 4(c) and (i) in the Federal Rules of Civil Procedure.

If You Have Any Questions

If you have any questions, you may call, write, or visit any Social Security office. If you do call or visit an office, please have this notice with you. The telephone number of the local office that serves your area is 503-326-5018. Its address is:

SOCIAL SECURITY
1538 SW YAMHILL ST
PORTLAND, OR 97205

ORIGINAL SIGNED BY

Hortensia Haaversen
Appeals Officer

Enclosure: Order of Appeals Council

cc: Richard Sly
Attorney at Law
1001 SW 5th Ave., Ste.310
Portland, OR 97204

Social Security Administration
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW

ORDER OF APPEALS COUNCIL

IN THE CASE OF	**CLAIM FOR**
Clayburn M. Lockwood Claimant	Period of Disability Disability Insurance Benefits Supplemental Security Income
(Wage Earner)	[Omitted] (Social Security Number)

The Appeals Council has received additional evidence which it is making part of the record. That evidence consists of the following exhibits:

Exhibit AC-1 Attorney Brief Dated 12/22/06 (8 Pages)

Date: OCT 17 2007

[SEAL] **SOCIAL SECURITY ADMINISTRATION**

Refer to: TLC
[Social Security
Number Omitted]

Office of Hearings and
Appeals
ODS Tower, 17th Floor
601 SW Second Ave
Portland, OR 97204

Date: APR 27 2006

Clayburn M. Lockwood
[Address Omitted]
Portland, OR 97210

NOTICE OF DECISION – UNFAVORABLE

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you disagree with my decision, you may file an appeal with the Appeals Council.

How to File an Appeal

To file an appeal you or your representative must request that the Appeals Council review the decision. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter.

You may file your request at any local Social Security office or a hearing office. You may also mail your request right to the ***Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255***. Please put

the Social Security number shown above on any appeal you file.

Time to File an Appeal

To file an appeal, you must file your request for review **within 60 days** from the date you get this notice.

The Appeals Council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The Council will dismiss a late request unless you show you had a good reason for not filing it on time.

Time to Submit New Evidence

You should submit any new evidence you wish to the Appeals Council to consider **with** your request for review.

How an Appeal Works

Our regulations state the rules the Appeals Council applies to decide when and how to review a case. These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 416 (Subpart N).

If you file an appeal, the Council will consider all of my decision, even the parts with which you agree. The Council may review your case for any reason. It **will** review your case if one of the reasons for review listed in our regulation exists.

Section 416.1470 of the regulation lists these reasons.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision more or less favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

The Appeals Council May Review The Decision On Its Own

The Appeals Council can review my decision even without your request to do so. If it decides to do that, the Council will mail you a notice about its review within 60 days from the date of this notice.

If No Appeal and No Appeals Council Review

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

If You Have Any Questions

If you have any questions, you may call, write or visit any Social Security office. If you visit an office, please bring this notice and decision with you. The telephone number of the local office that

serves your area is (503)326-5018. Its address is Social Security, 1538 SW Yamhill St, Portland, OR 97205.

Catherine R. Lazuran
Administrative Law Judge

cc: Richard A. Sly
Attorney At Law
1001 S W Fifth Avenue
Suite 310
Portland, OR 97204

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	**CLAIM FOR**
Clayburn M. Lockwood Claimant	Supplemental Security Income
(Wage Earner)	[Omitted] (Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

On April 23, 2003, the claimant protectively filed a Title II application for a period of disability and disability insurance benefits. The claimant also protectively filed a Title XVI application for supplemental security income on April 23, 2003. In both applications, the claimant alleged disability beginning December 15, 1998. The claims were denied initially

on October 3, 2003 and upon reconsideration on January 16, 2004. Thereafter, the claimant filed a timely written request for hearing on March 19, 2004 (20 CFR 404.929 et seq. and 416.1429 et seq.). The claimant appeared and testified at a hearing held on June 2, 2005, in Portland, Oregon. A supplemental hearing was held on October 13, 2005 in Portland, Oregon. The claimant did not appear but testimony was taken from a vocational expert, Gail Young. The claimant is represented by Richard Sly, an attorney. The claimant previously filed applications for disability insurance benefits and supplemental security income payments on November 9, 2001. The applications were denied in initial determinations on February 27, 2002.

ISSUES

The issue is whether the claimant is disabled under sections 216(i), 223(d) and 1614(a)(3)(A) of the Social Security Act. Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.

With respect to the claim for a period of disability and disability insurance benefits, there is an additional issue whether the insured status requirements of sections 216(i) and 223 of the Social Security Act are

met. The claimant's earnings record shows that the claimant has acquired sufficient quarters of coverage to remain insured through December 31, 1998. Thus, the claimant must establish disability on or before that date in order to be entitled to a period of disability and disability insurance benefits.

After careful consideration of all the evidence, the undersigned Administrative Law Judge concludes the claimant has not been under a disability within the meaning of the Social Security Act at any time through the date of this decision.

APPLICABLE LAW

Under the authority of the Social Security Act, the Social Security Administration has established a five-step sequential evaluation process for determining whether an individual is disabled (20 CFR 404.1520(a) and 416.920(a)). The steps are followed in order. If it is determined that the claimant is or is not disabled at a step of the evaluation process, the evaluation will not go on to the next step.

At step one, the undersigned must determine whether the claimant is engaging in substantial gainful activity (20 CFR 404.1520(b) and 416.920(b)). Substantial gainful activity (SGA) is defined as work activity that is both substantial and gainful. "Substantial work activity" is work activity that involves doing significant physical or mental activities (20 CFR 404.1572(a) and 416.972(a)). "Gainful work activity" is work that is usually done for pay or profit,

whether or not a profit is realized (20 CFR 404.1572(b) and 416.972(b)). Generally, if an individual has earnings from employment or self-employment above a specific level set out in the regulations, it is presumed that she has demonstrated the ability to engage in SGA (20 CFR 404.1574, 404.1575, 416.974, and 416.975). If an individual engages in SGA, she is not disabled regardless of how severe her physical or mental impairments are and regardless of her age, education, and work experience. If the individual is not engaging in SGA, the analysis proceeds to the second step.

At step two, the undersigned must determine whether the claimant has a medically determinable impairment that is "severe" or a combination of impairments that is "severe" (20 CFR 404.1520(c) and 416.920(c)). An impairment or combination of impairments is "severe" within the meaning of the regulations if it significantly limits an individual's ability to perform basic work activities. An impairment or combination of impairments is "not severe" when medical and other evidence establish only a slight abnormality or a combination of slight abnormalities that would have no more than a minimal effect on an individual's ability to work (20 CFR 404.1521 and 416.921; Social Security Rulings (SSRs) 85-28, 96-3p, and 96-4p). If the claimant does not have a severe medically determinable impairment or combination of impairments, she is not disabled. If the claimant has a severe impairment or combination

of impairments, the analysis proceeds to the third step.

At step three, the undersigned must determine whether the claimant's impairment or combination of impairments meets or medically equals the criteria of an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, and 416.926). If the claimant's impairment or combination of impairments meets or medically equals the criteria of a listing and meets the duration requirement (20 CFR 404.1509 and 416.909), the claimant is disabled. If it does not, the analysis proceeds to the next step.

Before considering step four of the sequential evaluation process, the undersigned must first determine the claimant's residual functional capacity (20 CFR 404.1520(e) and 416.920(e)). An individual's residual functional capacity is her ability to do physical and mental work activities on a sustained basis despite limitations from her impairments. In making this finding, the undersigned must consider all of the claimant's impairments, including impairments that are not severe (20 CFR 404.1520(e), 404.1545,.416.920(e), and 416.945; SSR 96-8p).

Next, the undersigned must determine at step four whether the claimant has the residual functional capacity to perform the requirements of her past relevant work (20 CFR 404.1520(f) and 416.920(f)). The term past relevant work means work performed (either as the claimant actually performed it or as it

is generally performed in the national economy) within the last 15 years or 15 years prior to the date that disability must be established. In addition, the work must have lasted long enough for the claimant to learn to do the job and have been SGA (20 CFR 404.1560(b), 404.1565, 416.960(b), and 416.965). If the claimant has the residual functional capacity to do her past relevant work, the claimant is not disabled. If the claimant is unable to do any past relevant work, the analysis proceeds to the fifth and last step.

At the last step of the sequential evaluation process (20 CFR 404.1520(g) and 416.920(g)), the undersigned must determine whether the claimant is able to do any other work considering her residual functional capacity, age, education, and work experience. If the claimant is able to do other work, she is not disabled. If the claimant is not able to do other work and meets the duration requirement, she is disabled. In order to support a finding that an individual is not disabled at this step, the Social Security Administration is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the claimant can do, given the residual functional capacity, age, education, and work experience (20 CFR 404.1512(g), 404.1560(c), 416.912(g) and 416.960(c)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After careful consideration of the entire record, the undersigned makes the following findings:

1. The claimant met the insured status requirements of the Social Security Act through December 31, 1998.

2. The claimant has not engaged in substantial gainful activity at any time relevant to this decision (20 CFR 404.1520(b) and 416.920(h)).

The claimant has done free lance work as an artist since her alleged onset date (Exhibit 19F, 10E). She testified that has not earned any income from this work. It appears that she has not engaged in substantial gainful activity.

3. The claimant has the following severe impairments: left knee injury and surgeries; degenerative disc disease of the lumbar spine with a history of fusion; a history of foot surgery; anxiety; a depressive disorder; and alcoholism (20 CFR 404.1520(c) and 416.920(c)).

Evidence regarding the claimant's knee injury and surgeries is in Exhibits 4F/3; 9F/22; 21 F/29 and 24F/70. Evidence of degenerative disc disease of the lumbar spine and the fusion surgery is in Exhibits 11F/5 and 20F/30. Exhibit IF has information about the foot condition. At Exhibits 19F/5 and 12F/11 there is evidence regarding an anxiety disorder. The depressive disorder is discussed in Exhibits 12F/11 and

19F/2. Alcoholism is reflected in Exhibit 11F/4. The claimant's impairments result in significant work-related functional limitations and are considered severe.

4. The claimant does not have an impairment or combination of impairments that meets or medically equals any of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).

Her physical impairments do not meet the criteria of any listed impairment. Her mental impairments result in mild restriction of activities of daily living, moderate difficulties in maintaining social functioning, and mild difficulties in maintaining concentration, persistence or pace. The claimant has not experienced episodes of decompensation of extended duration. She functions independently, cares for her teenage daughter, does art work, and performs household tasks. She reports she is socially isolated (Exhibit 12F) but testified that she helps her neighbors by watching their children and volunteers at her daughter's school. She exhibited adequate cognitive functioning, focused thought processes, and average memory on psychological testing (Exhibit 12F). Evidence does not establish the presence of the "D" or "C" criteria in the regulations. No physician has opined that her impairments meet or equal a listed impairment.

5. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to lift 20 pounds occasionally and 10 pounds frequently. She can stand and walk 6 hours out of an 8-hour day and sit 6 hours out of an 8-hour day. She can do simple and complex tasks not requiring close or frequent social contact with the public or others.

In making this finding, the undersigned considered all the medical evidence and evidence of symptoms in accordance with the requirements of 20 CFR 404.1529 and 416.929 and SSRs 96-4p and 96-7p. The undersigned also considered opinion evidence in accordance with the requirements of 20 CFR 404.1527 and 416.927 and SSRs 96-2p, 96-5p and 96-6p.

The claimant testified that she attempted to go back to school in 2002 but it was too stressful. She has looked for work since December 1998 but has been told she is too much of a liability. She sometimes helps neighbors by watching their children but is not paid. She has helped with field trips and art classes at her daughter's school and she walks in peace marches. She said she has back pain, left knee pain, right leg pain, mood swings and depression. She has had 6 knee surgeries. She has also had foot surgery. She wears a knee brace when she rides her bike or when it feels weak. On a good day her pain is a "5" on a scale of 0 to 10, with 0 being no pain. On a bad day her pain is a "10". She is prescribed Vicodin for pain and Prozac for depression. She said she drinks 1 or 2

beers a day. She has difficulty sleeping and with her medications she sleeps 4 to 6 hours at night. She lies down during the daytime for 1/2 hour. She can lift about 10 pounds occasionally. She needs to move around when she stands. She can stand 15 minutes at a time and 2 hours out of an 8-hour day. She can sit for 1/2 hour at a time and 1 hour out of an 8-hour day. She can walk for 1/2 hour at a time and 1 hour in an 8-hour day.

The claimant denied walking 10 miles a day at any time after 1998 and denied walking half marathons as indicated in treatment notes (Exhibits 9F-29, 21F-29). The claimant testified that she gets along with others but is selective about her friends. She vacuums, cooks, shops, and uses a bike for transportation. She has traveled to Seattle, California, and Colorado. She draws in a sketchbook, writes letters and poetry, and makes mixed media art projects. She has had art shows but generally has not sold anything. She reads and pays bills on her own. She attends movies and free concerts. She goes to art galleries, museums and the library.

After considering the evidence of record, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to produce some of the alleged symptoms, but-that the claimant's statements concerning the intensity, duration and limiting effects of these symptoms are not entirely credible.

The claimant has undergone multiple surgeries. She has a history of lumbosacral fusion surgery in 1997. She underwent left foot surgery for hammer toe and instability of the second metatarsophalangeal joint on February 26, 1999 (Exhibit IF). In December 1999 she underwent a partial lateral meniscectomy of the left knee (Exhibit 2F). The claimant reported she was running half marathons following the surgery but had an injury in December 2000 which caused further problems (Exhibit 12F-14). She required further left knee surgery in March 2001 (Exhibit 4F). In November 2001 she underwent left knee cruciate ligament reconstruction and left knee chondroplasty (Exhibit 5F).

The claimant underwent a consultative examination on June 2, 2003. The evaluating physician noted alcohol on her breath. The claimant reported she had a beer that day. She appeared to be inebriated and had difficulty keeping her eyes open. She slurred her speech. Walking was inconsistent, sometimes she walked on her tiptoes, and sometimes listed to one side. There was slight effusion in the left knee. Examination was difficult due to apparent intoxication. X-ray of the lumbar spine showed evidence of fusion surgery but was otherwise essentially normal. Kim Webster, M.D., diagnosed alcoholism, possible bipolar disease, low back pain and left knee pain. (Exhibit 11F). In June 2003 and February 2004 the claimant underwent further left knee surgeries (Exhibit 21F-7, 23).

Despite her multiple surgeries, Ms. Lockwood has led an active lifestyle. She bikes, gardens, swims, dances,

does yoga, and uses a hula hoop (Exhibits 9F-10-11, 18F-12). In February 2003 she reported she was looking for work, studying art in school, and working occasionally as a free lance artist (Exhibit 19F-25). She has traveled by train to Colorado (Exhibit 21F-40). She testified that she has also traveled to California and Seattle. Her active lifestyle is not consistent with her allegations of debilitating pain and depression or her allegations that she can sit, stand and walk only brief periods. Although the claimant alleges disabling knee pain, she failed to attend prescribed physical therapy (Exhibit 4F-7).

The claimant underwent a psychological evaluation on December 12, 2001. She reported having, panic attacks once or twice a week. She also reported feeling depressed. Cognitive functioning was estimated to be in the low average range, with deficits in abstract thinking, judgment and social reasoning. M. John Givi, Ph.D., diagnosed major depressive disorder, generalized anxiety disorder, and panic disorder without agoraphobia. (Exhibit 12F-7-12). At a March 2003 psychiatric evaluation the claimant reported she began feeling depressed a year prior. On mental status examination, memory and concentration were intact. She reported she had stopped taking Celexa 2 weeks prior. She was diagnosed with bipolar disorder (Exhibit 10F). The claimant was evaluated again by Dr. Givi in September 2003. An odor of alcohol on her breath was noted. She initially denied alcohol use and then reported she drinks only a beer at night. She cried frequently during the evaluation and reported

having 1 or 2 panic attacks a day. Dr. Givi indicated her symptoms did not support a diagnosis of bipolar disorder. On mental status examination memory functions were in the average range and attention span was in the low average range. Her symptoms were noted to be consistent with the prior evaluation in 2001. (Exhibit 12F-1-6).

At a psychiatric evaluation in October 2004 the claimant was diagnosed with bipolar disorder but it was noted that her last manic episodes occurred nearly 20 years ago. She was prescribed Paxil and Clonidine (Exhibit 19F-38-40).

Although the claimant experiences depression and anxiety, she is able to lead an active life despite her symptoms. Her activities are not consistent with her allegations of debilitating depression and anxiety. She reports visiting museums and galleries, attending concerts, walking in peace marches, and doing art work. The claimant's credibility is further undermined by her poor work history. She performed little work even prior to her alleged onset date of disability. (Exhibit 6D). Her mental health provider notes she has poor compliance with medications (Exhibit 19F-35). This hurts her credibility also.

The claimant did not attend the supplemental hearing, and reported that she was "terrorized" and "traumatized" by the Administrative Law Judge at the first hearing (Exhibit 12B). These complaints appear to be exaggerated in light of her calm appearance at the hearing and her report to her mental

health counselor that the hearing was "unsettling" (Exhibit 25F-2).

James McCormick, a friend of the claimant, reported in May 2003 that the claimant spends her day getting her daughter to school, attending school herself, doing homework, making art, and bike riding. She prepares meals, cleans, and does laundry but requires rest breaks. She paints and rides her bike daily. She has to be careful when climbing stairs. Her concentration is impaired when she has a panic attack. She can walk 4 to 6 blocks. She uses crutches, a cane or a brace occasionally. She does not handle stress well. (Exhibit 10E). The observations of Mr. McCormick concerning the claimant's daily activities are generally credible. However, his allegations concerning her limitations in walking and standing are not consistent with the evidence that claimant's activities include biking; housework, yard work, yoga, swimming, dancing, and using a hula hoop (Exhibits 9F-10-11, 18F-12).

As for the opinion evidence, the state agency consultants opine that the claimant is able to lift 20 pounds occasionally and 10 pounds frequently. She can stand and walk 6 hours out of an 8-hour day and sit 6 hours out of an 8-hour day. She should avoid climbing ladders, ropes or scaffolds and should avoid exposure to other hazards due to alcohol use. She is capable of simple tasks. She is limited to brief, occasional public contact. (Exhibits 14F, 16F, 17F). The opinion of the state agency consultants concerning the claimant's exertional limitations is consistent with the treatment

record and is given significant weight. The claimant has presented at two consultative evaluations with the odor of alcohol on her breath, but no treating source has expressed concerns regarding alcoholism. Although the record is not entirely clear on the extent of her alcohol use, in light of the lack of references to alcohol use by any treating provider, the undersigned finds she is not limited in her ability to work around hazards. The opinion of the state agency consultants concerning the claimant's mental limitations is generally consistent with the treatment records and is given significant weight. However, treatment records do not support a finding that she is restricted to simple tasks. In prior determinations the state agency consultants found she could carry out complex tasks not requiring close or frequent interpersonal contact (Exhibit 7F). This assessment is more consistent with the treatment record and the claimant's daily activities. There is no evidence that the claimant's cognitive functioning has declined. She continues to do art work and write poetry. M. John Givi, M.D., an evaluating psychiatrist indicated she had deficits in "social-practical judgment" but that she did not have cognitive problems preventing her from working. (Exhibit 12F-6). His opinion is consistent with the social limitations I have described and those provided by the state agency consultants.

Brinda Krishnan, M.D., a treating psychiatrist, assessed a GAF of 58 in October 2004. This is indicative of moderate symptoms or moderate difficulty in social, occupational or school functioning. On mental

status examination cognition was intact and there was no psychosis or suicidal ideation. (Exhibit 23F-9-11). In June 2005 the claimant's counselor assessed a GAF of 62, indicative of mild symptoms or some difficulty in social, occupational or school functioning (Exhibit 25F). Prior GAF assessments from her counselor were similar, with GAF scores of 58 to 60 (Exhibit 19F-1-6). These treating sources have not described specific limitations; however, their assessments are generally consistent with a capacity for work activity and the functional capacity I have described.

Hans S. Moller, III, M.D., a treating physician, opined on November 20, 2001 that the claimant was unable to do regular work from March 2001 to April 2002 (Exhibit 21F-35). Dr. Moller provided no specific limitations and provided no explanation for his assessment. He also did not indicate what "regular work" he is referring to. Apparently, he is referring to some work that the claimant has done in the past. His opinion involves vocational issues and that is not his area of expertise. Because of that and the vague nature of his statement, his opinion is given little weight.

In October 2001 the claimant requested a note from her treating physician, Marie-Louise D'Hulst, M.D., stating that she had not been able to work due to knee pain and panic attacks. Dr. D'Hulst responded that she could not provide this note (Exhibit 9F-21). This indicates the doctor did not view the claimant as disabled.

It is also important to note that, in order to be entitled to disability insurance benefits, the claimant would have to show that she was disabled by her date last insured of December 31, 1998. The record does not support a finding of that.

6. The claimant is unable to perform any past relevant work (20 CFR 404.1565 and 416.965).

The claimant has past relevant work as an operator of a bed and breakfast and a bread seller. The vocational expert testified that these jobs require frequent contact with the public and would be precluded by the claimant's residual functional capacity. The testimony of the vocational expert is accepted as credible. Accordingly, the claimant is unable to perform past relevant work.

7. The claimant was born on May 31, 1951 and was 47 years old on the alleged disability onset date, which is defined as a younger individual age 45-49. She is currently 54 and an individual closely approaching advanced age (20 CFR 404.1563 and 416.963).

8. The claimant has at least a high school education and is able to communicate in English (20 CFR 404.1564 and 416.964).

9. The claimant has minimally transferable job skills or semi-skills, according to the vocational expert (20 CFR 404.1568 and 416.968).

The vocational expert indicated that the claimant has minimally transferable skills or semi-skills related to

her past work. This apparently relates to the limited time that she spent at the bed and breakfast.

10. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 404.1560(c), 404.1566, 416.960(c), and 416.966).

In determining whether a successful adjustment to other work can be made, the undersigned must consider the claimant's residual functional capacity, age, education, and work experience in conjunction with the Medical-Vocational Guidelines, 20 CFR Part 404, Subpart P, Appendix 2. If the claimant can perform all or substantially all of the exertional demands at a given level of exertion, the medical-vocational rules direct a conclusion of either "disabled" or "not disabled" depending upon the claimant's specific vocational profile (SSR 83-11). When the claimant cannot perform substantially all of the exertional demands of work at a given level of exertion or has nonexertional limitations, the medical-vocational rules are used as a framework for decision making unless there is a rule that directs a conclusion of "disabled" without considering the additional exertional or nonexertional limitations (SSRs 83-12 and 83-14). If the claimant has solely nonexertional limitations, section 204.00 in the Medical-Vocational Guidelines provide a framework for decision making (SSR 85-15).

If the claimant had the residual functional capacity to perform the full range of light work, a finding of "not disabled" would be directed by Medical-Vocational Rules 202.21 and 202.14. However, the claimant's ability to perform all or substantially all of the requirements of this level of work has been impeded by additional limitations. To determine the extent to which these limitations erode the unskilled light occupational base, the Administrative Law Judge asked the vocational expert whether a significant number of jobs exist in the national economy for an individual with the claimant's age, education, work experience, and residual functional capacity. The vocational expert testified that such an individual would be able to perform the requirements of representative occupations such as a production assembler and house cleaner. These are light exertion jobs which do not require the performance of tasks precluded by the claimant's residual functional capacity. There are 1,700,000 production assembler jobs and 764,000 house cleaner jobs in the national economy.

Pursuant to SSR 00-4p, the vocational expert's testimony is consistent with the information contained in the Dictionary of Occupational Titles.

Based on the testimony of the vocational expert, the undersigned concludes that, considering the claimant's age, education, work experience, and residual functional capacity, the claimant has been and is capable of making a successful adjustment to other work that exists in significant numbers in the national economy. A finding of "not disabled" is therefore

appropriate under the framework of the above-cited rules and based on the vocational expert's testimony.

11. The claimant has not been under a "disability," as defined in the Social Security Act, from December 15, 1998 through the date of this decision (20 CFR 404.1520(g) and 416.920(g)).

DECISION

Based on the application for a period of disability and disability insurance benefits protectively filed on April 23, 2003, the claimant is not disabled under sections 216(i) and 223(d) of the Social Security Act.

Based on the application for supplemental security income protectively filed on April 23, 2003, the claimant is not disabled under section 1614(a)(3)(A) of the Social Security Act.

/s/ Catherine R. Lazuran
Catherine R. Lazuran
Administrative Law Judge

APR 27 2006
Date

mv

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLABURN M. LOCKWOOD, Plaintiff-Appellant, v. COMMISSIONER SOCIAL SECURITY ADMINISTRATION, Defendant-Appellee.	No. 09-35546 D.C. No. 3:07-cv-01838-KI District of Oregon, Portland ORDER (Filed Dec. 06 2010)

Before: KLEINFELD, BEA, and IKUTA, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. Judges Bea and Ikuta have voted to deny the petition for rehearing en banc, and Judge Kleinfeld so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and rehearing en banc is denied.

Effective Dates: 09/15/2009 – Present (Go to History)

TN 3 (05-06)

DI 25015.005 Age as a Vocational Factor

Citations:
20 CFR 404.1563
20 CFR 416.963

A. Policy

1. General

"Age" means an individual's chronological age. An individual reaches a particular age on the day before his or her birthday. (*GN 00302.400*). When we decide whether an individual is disabled under *DI 25015.001*, we will consider the individual's chronological age in combination with the individual's residual functional capacity, education, and work experience; we will not consider the individual's ability to adjust to other work on the basis of the individual's age alone.

In determining the extent to which age affects a person's ability to adjust to other work, we consider advancing age to be an increasingly limiting factor in the person's ability to make such an adjustment, as we explain in DI 25015.005A.4. through DI 25015.005A.6. If an individual is unemployed but still has the ability to adjust to other work, we will find that the individual is not disabled. In DI 25015.005A.2.

through DI 25015.005A.6. and in DI 25025.005, we explain in more detail how we consider an individual's age as a vocational factor.

2. How We Apply the Age Categories

When we make a finding about an individual's ability to do other work under DI 25015.001, we will use the age categories in DI 25015.005A.4. through DI 25015.005A.6. We will use each of the age categories that apply during the period for which we must determine if an individual is disabled.

3. Borderline Age Situations

We will not apply the age categories mechanically in a borderline age situation. If an individual is within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that the individual is disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of the individual's case.

To identify borderline age situations when making disability determinations, adjudicators will apply the following two-part test:

- Is the individual's age within a few days to a few months of the next higher age category?
- If so, would using the higher age category result in a determination of "disabled" while using the individual's chronological age

would result in a determination of "not disabled"?

If the answer to one or both is "no," a borderline age situation does not exist. The adjudicator will then use the claimant's chronological age. If the answer to both is "yes," a borderline age situation exists but use of the higher age category is not automatic. The two-part test only determines the existence of a borderline age situation. The adjudicator must decide whether it is more appropriate to use the next higher age or the claimant's chronological age.

Adjudicators should note that:

- Determining how much time can separate an individual's actual age from the next higher age category is a matter for adjudicative judgment. Such judgments must be supported by the evidence in file and be carefully explained. However, finding a borderline situation as much as one year before the next higher age is difficult to justify and, therefore, will be rare.

- Setting definitive criteria for what is meant by a few days or months, such as 3 months or 6 months before attainment of the next higher age category is not appropriate. To do so would be to apply age criteria mechanically and to establish additional age categories not found in the regulations.

Consideration of an individual's age does not take place until step 5 of the sequential evaluation process. Borderline age situations arise most often in the

use of the medical-vocational guidelines in *DI 25025.000* (including those rules that refer to transferable skills). In addition, a borderline age situation can arise in the consideration of any special medical-vocational profile where age is part of the listed criteria (see *DI 25010.001*) and at any other point in a case where age is an issue and the criteria of the two-part test are met. For example, consider applying these guidelines whenever an individual attains (or would attain) a higher age category within a few months after:

- the alleged onset date;
- the date last insured;
- the expiration of the prescribed period;
- the proposed CDR cessation month.

4. Younger Person

If an individual is a younger person (under age 50), we generally do not consider that the individual's age will seriously affect the individual's ability to adjust to other work. However, in some circumstances, we consider that persons age 45-49 are more limited in their ability to adjust to other work than persons who have not attained age 45. See Rule 201.17 in DI 25025.005.

5. Person Closely Approaching Advanced Age

If an individual is closely approaching advanced age (age 50-54), we will consider that the individual's age along with a severe impairment(s) and limited work experience may seriously affect the individual's ability to adjust to other work.

6. Person of Advanced Age

We consider that at advanced age (age 55 or older), age significantly affects a person's ability to adjust to other work. We have special rules for persons of advanced age and for persons in this category who are closely approaching retirement age (60 or older). (See *DI 25015.015A.3.g.*)

7. Individuals Age 65 or Older

Generally, the rules for individuals aged 60-64 are used for individuals aged 65 and older. See DI 25015.025.

B. Policy – When to Use the Next Higher Age Category in a Borderline Age Situation

1. Determining Whether the Specific Facts of the Case Support the Use of the Next Higher Age Category

Once it has been decided that a borderline age situation exists (the criteria of the two-part test in *DI 25015.005A.3.* have been met), the adjudicator then considers whether the specific facts of the individual

case support the use of the next higher age category. If they do not, the individual's chronological age is used in adjudication – even when he or she is only a few days from attaining a critical age.

- The medical-vocational rules fully consider the relative adversities of a claimant's exertional capabilities, age, education and work experience (including skill level).
- Therefore, additional vocational adversities in residual functional capacity (RFC), education, or work experience (beyond those already considered in the rules) are needed to support a determination to use the next higher age.
- Additional vocational adversity is found when some adjudicative factor(s) is relatively more adverse when considered in terms of that factor's stated criteria, or when there is an additional element(s) which has adverse vocational implications.
- The longer the period of time between an individual's actual age and attainment of the next higher age category, the progressively greater the additional adversity that must be present to support the use of the next higher age.
- Conversely, the shorter the period between an individual's actual age and the next higher age category, the less adversity and justification that are needed.

- If there are no additional vocational adversities justifying use of the higher age category, the adjudicator will use the claimant's chronological age.

2. Examples of Factors that Can Be Considered Adverse

Examples of some of the factors that could be considered additional vocational adversities are:

- The presence of an additional impairment(s) which infringes upon – without substantially narrowing – a claimant's remaining occupational base (e.g., a nonsevere allergy to printing ink or other unique substance used in an isolated industry);
- A limitation that does not significantly erode an individual's remaining unskilled occupational base (e.g., a limitation to no overhead reaching or to no frequent stooping for an individual with a sedentary exertional level, or any mental limitation that at least permits the performance of unskilled work);
- A claimant who may be barely literate in English or have only a marginal ability to communicate in English);
- A history of work experience in an unskilled job(s) in one isolated industry or work setting (e.g., a family business or oyster bed worker or forest worker).

These are examples only and should not be applied mechanically or without applying the guidelines in

the preceding paragraphs. Other adverse circumstances in individual cases may justify using a higher age category. Whether additional vocational adversity is present in a particular case, and, if so, what period of time between an individual's actual age and attainment of the next higher age category it will support, are matters for sound adjudicative judgment.

3. Establishing Onset of Disability When a Borderline Age Situation Exists

Onset of disability may only be established from the date that the presence of additional adversities in the case, when considered along with the individual's chronological age on that date (i.e., considering the length of time from that date until the individual reaches the next higher age category), justify the use of the higher age category in a borderline age situation.

If an adjudicator concludes that use of the next higher age category is justified as of a particular date, that date becomes the date of onset of disability. This may or may not result in a fully favorable determination. Do not set onset at a time when the borderline age provision would not be applicable (e.g., The borderline age criteria are met and support a recent onset, but the AOD is in the remote past when the individual was more than a few days or months from attainment of the critical age.).

4. Explaining the Determination in a Borderline Age Situation

Anytime a borderline age situation exists, the adjudicator must state whether it was determined to use the next higher age category or to use the individual's chronological age and explain why. The specific factors supporting either determination must be explained.

C. Procedure – Age Discrepancy

1. Age Discrepancy is Material

a. Telephone the Servicing FO

- Request that they undertake development for proof of age.
- Advise the FO that you will mail an SSA-883-U3 (Request for Evidence or Assistance (Disability Case)) to confirm this telephone request.
- Request the FO notify the DDS by phone of the results of their age development as soon as it is completed.
- Ask the FO to also complete and return the SSA-883-U3 that you are mailing to them.

b. Mail an SSA-883-U3 Confirming the Telephone Request to the FO

NOTE: (See DI 25001.001 for definition of material discrepancy.)

2. Age Discrepancy is not Material

a. Do not undertake any development to resolve the discrepancy.

b. For findings of not disabled, explain the lack of adjudicative impact of the varying age levels on an SSA-5002 or case summary sheet.

Section History

Go To *Transmittal* or *Action Item Explanation*

Prior Versions of Section

Effective Date	**Title**
11/20/2008 – 09/14/2009	*Age as a Vocational Factor*
07/21/2006 – 11/19/2008	*Age as a Vocational Factor*
05/25/2006 – 07/20/2006	*Age as a Vocational Factor*
06/20/2002 – 05/24/2006	*Age as a Vocational Factor*
06/22/2000 – 06/19/2002	*Age as a Vocational Factor*
02/06/1997 – 06/21/2000	*Age as a Vocational Factor*

This section is no longer current. It appears
here for historical purposes only.
Click here to go to the current version of this section.

OBSOLETE POLICY **Effective Dates:**
06/20/2002 – 05/24/2006

BASIC (07-00)

DI 25015.005 Age as a Vocational Factor

A. POLICY

1. General

"Age" means an individual's chronological age. An individual reaches a particular age on the day before his or her birthday. (*GN 00302.400*). When we decide whether an individual is disabled under *DI 25015.001*, we will consider the individual's chronological age in combination with the individual's residual functional capacity, education, and work experience; we will not consider the individual's ability to adjust to other work on the basis of the individual's age alone.

In determining the extent to which age affects a person's ability to adjust to other work, we consider advancing age to be an increasingly limiting factor in the person's ability to make such an adjustment, as we explain in DI 25015.005A.4. – DI 25015.005A.6. If an individual is unemployed but still has the ability to adjust to other work, we will find that the individual is not disabled. In sections DI 25015.005A.2. – DI

25015.005A.6. and in DI 25025.005, we explain in more detail how we consider an individual's age as a vocational factor.

2. How We Apply the Age Categories

When we make a finding about an individual's ability to do other work under DI 25015.001, we will use the age categories in DI 25015.005A.4. – DI 25015.005A.6. of this section. We will use each of the age categories that apply during the period for which we must determine if an individual is disabled.

3. Borderline Age Situations

We will not apply the age categories mechanically in a borderline situation. If an individual is within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that the individual is disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of the individual's case.

4. Younger Person

If an individual is a younger person (under age 50), we generally do not consider that the individual's age will seriously affect the individual's ability to adjust to other work. However, in some circumstances, we consider that persons age 45-49 are more limited in their ability to adjust to other work than persons who

have not attained age 45. See Rule 201.17 in DI 25025.005.

5. Person Closely Approaching Advanced Age

If an individual is closely approaching advanced age (age 50-54), we will consider that the individual's age along with a severe impairment(s) and limited work experience may seriously affect the individual's ability to adjust to other work.

6. Person of Advanced Age

We consider that at advanced age (age 55 or older), age significantly affects a person's ability to adjust to other work. We have special rules for persons of advanced age and for persons in this category who are closely approaching retirement age (age 60-64). (See DI 25015.015A.3.g.)

7. Individuals Age 65 or Older

This age category is relevant for title XVI claims only. See DI 25015.025.

B. PROCEDURE

1. Age Discrepancy is Material

a. Telephone the servicing FO:

- Request that they undertake development for proof of age.

- Advise the FO that you will mail an SSA-883-U3 (Request for Evidence or Assistance (Disability Case)) to confirm this telephone request.
- Request the FO notify the DDS by phone of the results of their age development as soon as it is completed.
- Ask the FO to also complete and return the SSA-883-U3 that you are mailing to them.

b. Mail an SSA-883-U3 confirming the telephone request to the FO.

NOTE: (See DI 25001.001 for definition of material discrepancy.)

2. Age Discrepancy is Not Material

a. Do not undertake any development to resolve the discrepancy.

b. For findings of not disabled, explain the lack of adjudicative impact of the varying age levels on an SSA-5002 or case summary sheet.

Office of Hearings and Appeals
Social Security Administration (S.S.A.)
Department of Health and Human Services

Volume II
Part 5: Appeals Council Interpretations
Chapter: II-5-3

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II-5-3-2 APPLICATION OF THE MEDICAL-VOCATIONAL GUIDELINES IN BORDERLINE AGE SITUATIONS

Appeals Council Interpretation

SUBJECT : Application of the Medical-Vocational Guidelines in Borderline Age Situations

ISSUE : What is a borderline age situation and what factors should be considered when determining whether to use a higher age than a claimant's chronological age when applying the medical-vocational guidelines?

DISCUSSION : The regulations at 20 CFR 404.1560(c), 404.1563(a), 416.960(c), and 416.963(a) provide that age, residual functional capacity, education, and work experience are the vocational factors relevant to determining disability at the last step of the sequential

evaluation process. Sections 404.1563 and 416.963 note that age "refers to how old you are (your chronological age) and the extent to which your age affects your ability to adapt to a new work situation and to do work in competition with others.' These regulations also define the age categories of "younger person' (under age 50), "person approaching advanced age' (50-54), and "person of advanced age' (55 or over); note the role of age as a vocational factor; and state that "we will not apply the[ ] age categories mechanically in a borderline situation.' Because the regulations do not define the term "borderline situation,' the Appeals Council has adopted the following interpretation and guidelines.

INTERPRETATION : To identify borderline age situations when making disability determinations, adjudicators will apply a two-part test:

(1) Determine whether the claimant's age is within a few days or a few months of a higher age category.

(2) If so, determine whether using the higher age category would result in a decision of "disabled' instead of "not disabled."

If the answer to one or both is "no,' a borderline age situation either does not exist or would not affect the outcome. The adjudicator will then use the claimant's chronological age.

If the answer to both is "yes,' a borderline age situation exists and the adjudicator must decide whether it is more appropriate to use the higher age or the claimant's chronological age. (Use of the higher age category is not automatic.) To decide which age category to use, take a "sliding scale' approach. Under this approach, the claimant must show progressively more additional vocational adversity(ies) – to support use of the higher age – as the time period between the claimant's actual age and his or her attainment of the next higher age category lengthens.

One finds additional vocational adversity(ies) if some adjudicative factor(s) is relatively more

adverse when considered in terms of that factor's stated criteria, or when there is an additional element(s) which has adverse vocational implications. Examples of these additional vocational adversities are the presence of an additional impairment(s) which infringes upon – without substantially narrowing – a claimant's remaining occupational base; or the claimant may be barely literate in English, have only a marginal ability to communicate in English, or have a history of work experience in an unskilled job(s) in one isolated industry or work setting. (An isolated industry would be such as fishing or forestry.) Other adverse circumstances in individual cases may justify using the higher age category.

Absent a showing of additional adversity(ies) justifying use of the higher age category, the adjudicator will use the claimant's chronological age – even when the time period is only a few days. The adjudicator need not explain his or her use of the claimant's chronological age.

Consider applying these guidelines whenever the age category changes within a few months after the alleged onset date, the date last insured (or the prescribed period), or the date of the ALJ's decision.

The Appeals Council will ordinarily deny review, assuming there is no other basis for granting review, when a borderline age situation exists, the ALJ's decision does not address the issue, and the Appeals Council does not find sufficient basis in the record for using the higher age category.

APPLICATION : The Appeals Council will apply this interpretation in all cases that come before it involving the same issue.

EFFECTIVE DATE : November 2, 1993

CROSS-REFERENCE : 20 CFR 404.1560, 404.1563, 416.960, and 416.963; Office of Disability's Disability Digest 93-9.